RECENT CASES

BANKRUPTCY—RECEIVERSHIP—POWER OF STATE COURT TO AWARD RECEIVER'S COMPENSATION AFTER INTERVENING BANKRUPTCY—Trustees in bankruptcy were appointed by a Federal District Court three months after a State Court had appointed its own receiver to wind up the affairs of an insolvent corporation. The state court ordered its receiver to turn over to the trustee all the assets in his possession except a small cash balance. Five years later the state receiver filed a supplemental account and applied for compensation. *Held,* that despite the intervening bankruptcy, it was within the power of the state court to determine the receiver's compensation. *Isenberg v. Kimberley Phonograph Co. of New Jersey,* 161 Atl. 688 (N. J. 1932).

In line with the decision in *Isaacs v. Hobbs Tie & Timber Co.*,[1] enunciating the supremacy of the bankruptcy court over other courts, one finds federal courts concluding [2] that if bankruptcy proceedings have intervened since the appointment of a receiver by another court,[3] the power to determine the receiver's compensation is exclusively in the bankruptcy court.[4] These Federal decisions however, are challenged by numerous state decisions to the contrary.[5] There should be no categorical answer to the question raised.[6] If the prior proceeding is *superseded* by the intervening bankruptcy [7] and the trustee in bankruptcy has made an immediate demand for the assets, then the bankruptcy court alone should determine the claim of the receiver. This is in accord with the general objects of the bankruptcy laws to secure a just distribution of the property by centralizing in one court the consideration of all claims against the estate.[8] If, however, the bankruptcy does not have the legal effect of preventing a continuation of the prior proceedings,[9] then it seems proper to recognize a power in the court retaining jurisdiction to fix its receiver's compensation as an incident to the complete administration of the property controlled; [10] even though this

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[1] 282 U. S. 734, 51 Sup. Ct. 270 (1931).

[2] Silberberg v. Ray Chain Stores, Inc., 54 F. (2d) 650 (D. C. N. J. 1931), *aff'd* 58 F. (2d) 766 (C. C. A. 3d, 1932); Moore v. Scott, 55 F. (2d) 863 (C. C. A. 9th, 1932); see also, earlier Federal cases; *In re* Williams, 240 Fed. 788 (N. D. Ohio 1917); Lion Bonding Co. v. Karatz, 262 U. S. 640, 43 Sup. Ct. 641 (1923).

[3] *I. e.* either a state or federal court exercising general equity powers.

[4] State decisions in accord: State by Att'y Gen. v. German Exchange Bank, 114 Wis. 436, 90 N. W. 570 (1902); Bloch v. Bloch, 42 Misc. 278, 86 N. Y. Supp. 1047 (1903).

[5] Wilson v. Parr, 115 Ga. 629, 42 S. E. 5 (1902); Shannon v. Shepard Manuf. Co., Inc., 230 Mass. 224, 119 N. E. 768 (1918); Colton v. Bankshares Corp. of U. S., 108 N. J. Eq. 417, 155 Atl. 471 (1931); Perfection Garment Co. v. Crosby Stores, Inc., 109 N. J. Eq. 450, 158 Atl. 380 (1932); *In re* Board of Directors of Suburban Const. Co., 143 N. Y. Supp. 363 (1913); Mauran v. Crown Carpet Lining Co., 23 R. I. 344, 50 Atl. 387 (1901).

[6] One finds in HIGH, RECEIVERS (4th ed. 1910) § 796b: ". . . the receiver is entitled to his compensation and other expenses already incurred out of the fund in his possession before surrendering it to the trustee in bankruptcy, and no considerations of comity require the state court . . . to send its receiver to that (bankruptcy) court for his compensation." In CLARK, RECEIVERS (2d ed. 1929) § 641 (1) there appears, "The Federal Bankruptcy Court has power, by summary order, to compel a state court receiver, previously appointed over the same property, to turn over money or property in his possession to the bankruptcy court, to await its action on the question of compensation. . . ."

[7] For situations where this occurs see, 5 REMINGTON, BANKRUPTCY (3d ed. 1923) § 2067 *et seq.* For a general discussion: Williston, *The Effect of a National Bankruptcy Law Upon State Laws* (1909) 22 HARV. L. REV. 547; Note (1930) 14 MINN. L. REV. 658.

[8] 1 REMINGTON, BANKRUPTCY (3d ed. 1923) 18.

[9] For example, Straton v. New, 283 U. S. 318, 51 Sup. Ct. 465 (1931) (creditor's suit instituted more than four months before bankruptcy); Clark v. Norwalk Steel & Iron Co., 188 Fed. 999 (N. D. Ohio 1908) (receivership in lien foreclosure suit).

[10] Hoover v. Mortgage Co. for America, 290 Fed. 891 (C. C. A. 9th, 1923).

in effect lessens the balance to be turned over ultimately to the trustee in bankruptcy.[11] There is an intermediate group of cases where the trustee in bankruptcy has the power to demand the assets from the receiver but instead either consents to or fails to prevent a continuation of the receivership activities in the prior court.[12] Here again, by analogy to the group of cases immediately preceding, the court which continues to administer the property should be permitted to award compensation to its receivers. In the instant case there existed an element of consent[13] by the trustees to the state court proceedings, and in view of this fact the decision may be justified. It is to be noted, however, that although the analysis presented reconciles the results in many cases, the theories of the courts are at variance. A legislative expression on this controversy is perhaps desirable if conflict between courts is to be avoided.

BANKS AND BANKING—RIGHT OF GUARDIAN OF FEDERAL PENSIONER TO PRIORITY IN ASSETS OF INSOLVENT BANK—The guardian of a mentally incompetent war veteran received compensation and disability benefits to which his ward was entitled and invested them in "industrial certificates of deposit" of a trust company which went into receivership. The guardian then demanded that the certificates receive priority on the ground that he was but an agent of the government and that the funds were still moneys of the United States until they came into the actual possession of his ward. *Held* (two justices dissenting), that the claimant was not entitled to priority. *Shippee, Bank Com'r v. Commercial Trust Co. In Re Callery,* 161 Atl. 775 (Conn. 1932).

The problem here presented has become one of considerable practical importance as is evidenced by the many recent decisions *pro* and *contra.*[1] Undoubtedly, if the contention of the guardian as to his agency were true, he should recover because of the federal statute providing priority in the assets of any debtor.[2] Since the government has a conceded power to control its payment

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[11] Blair v. Brailey, 221 Fed. 1, 6 (C. C. A. 5th, 1915) (recognizing the trustee's right to any surplus).

[12] The element of consent is mentioned by the courts only inferentially in many cases. For factual situations containing consent see, Mauran v. Crown Carpet Lining Co., *supra* note 5; Perfection Garment Co. v. Crosby Stores, Inc., *supra* note 5; Isenberg v. Kimberley Phonograph Co. of New Jersey, *infra* note 13.

[13] "At the making of this (the original) order the trustees in bankruptcy appeared by their solicitors and filed express written consent thereto". 161 Atl. 688 at 689.

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[1] *Accord:* Smith v. Spicer's Guardian, 50 S. W. (2d) 64 (Ky. 1932); Puffenbarger v. Charter, 165 S. E. 541 (W. Va. 1932); *cf.* State *ex rel.* Smith v. Board of Com'rs, 132 Kan. 233, 294 Pac. 915 (1931), petition for writ of certiorari denied, 283 U. S. 855, 51 Sup. Ct. 648 (1931), in which money received by the guardian of a veteran's orphans was invested in bonds and was held not to be exempt from taxation since the guardian was not the agent of the government. *Contra:* Anderson v. Olivia State Bank *et al.,* 243 N. W. 398 (Minn. 1932); Butler v. Cantley, Com'r of Finance, 47 S. W. (2d) 258 (Mo. 1932); State *ex rel.* Spillman v. First National Bank, 121 Neb. 515, 237 N. W. 623 (1931). The split of authority here is clear. It is interesting that in the instant case the court was divided three to two.

[2] "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors and administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; . . ." REV. STAT. § 3466 (1878), 31 U. S. C. A. § 191 (1927). This right to priority is necessarily founded on statutes since the United States has no common law. United States v. State Bank of N. C., 6 Pet. 29, 35 (1832), opinion by Story, J. For a full discussion of this subject see Meier, *Preferential Rights to Public Funds Deposited in an Insolvent Bank* (1930) 4 CIN. L. REV. 39, 51. See also Marshall v. New York, 254 U. S. 380, 41 Sup. Ct. 143 (1920); (1912) 26 HARV. L. REV. 92; (1924) 8 MINN. L. REV. 351, 354.

of pensions in any manner,[3] those courts that hold that the guardian is an agent of the government [4] base their reasoning on the ground that such an intention of Congress is shown in the various pension acts,[5] which specify that no pension money due or to become due shall be taxed or seized, but shall inure wholly to the benefit of the pensioner,[6] that the federal director may suspend payment to a guardian,[7] and that a guardian embezzling such funds is guilty of an offence against the United States.[8] But, according to the general rule, money in the hands of the guardian is money in the hands of the ward,[9] and the Supreme Court of the United States has stated that the act of Congress makes no change in respect to the duties of a guardian under the state laws.[10] Nowhere in the federal statutes can there be found any express intention that title to funds remain in the United States after payment to the guardian. Obviously Congress intended such payment to be a valid discharge of its obligation, and courts deciding otherwise appear to be actuated chiefly by a strong desire to protect the veterans as a class.[11]

[3] "Power to protect the fund from misappropriation, fraud, and unauthorized conversion to the use of another, and to secure its safe and unimpaired transmission to the beneficiary, has been claimed and exercised through the whole period since Congress, under the Constitution, commenced to grant such bounties." Clifford, J., in United States v. Hall, 98 U. S. 343, 349 (1878).

[4] See cases cited *supra* note 1. *Cf.* Tama County v. Kepler, 187 Iowa 34, 173 N. W. 912 (1919). These cases are not to be confused with such cases as United States Fidelity and Guaranty Co. v. Bramwell, 295 Fed. 331 (D. Ore. 1923), *aff'd*, 269 U. S. 483, 46 Sup. Ct. 176 (1926), where the funds involved were deposited in a bank by an agent or officer of the government in its capacity as guardian of the Indians.

[5] The courts that hold this view think that the government exerts such a control over the moneys in the hands of the guardian as to constitute him its agent. The most important of the recent acts relied on to support this view is The World War Veteran's Act, 43 STAT. 607, c. 320 (1924), 38 U. S. C. A. 190, c. 10 (1928).

[6] REV. STAT. § 4747 (1878), 38 U. S. C. A. § 54 (1928); 43 STAT. 613, § 22 (1924), 38 U. S. C. A. § 454 (1928). Some of the state courts have interpreted this provision as meaning that even property bought with such funds is exempt. Crow v. Brown, 81 Iowa 344, 46 N. W. 993 (1890); *cf.* Yates County National Bank v. Carpenter, 119 N. Y. 550, 23 N. E. 1108 (1890). In Manning v. Spry, 121 Iowa 191, 194, 96 N. W. 873, 874 (1903), Deemer, J., said "The pension money is exempt, not only from execution, but also from taxation, so long as it remains in the shape of money to meet the daily wants and necessities of the pensioner." But the Supreme Court of the United States specifically cited the first two cases and disagreed with them in McIntosh v. Aubrey, 185 U. S. 122, 22 Sup. Ct. 561 (1902) and held that when the money has been paid it has inured wholly to the pensioner's benefit and that the exemption provided by the act protects the fund only while in the course of transmission to the pensioner. *Accord: In re* Jones, 166 Fed. 337 (D. Me. 1909); Cranz v. White, 27 Kan. 319 (1882). Since this question involves the interpretation of a federal statute, most of the state courts are naturally in accord with this view taken by the Supreme Court.

[7] 43 STAT. 613, § 21 (1924), 38 U. S. C. A. § 450 (1928).

[8] 43 STAT. 1312, § 505 (1924), § 20, c. 553 (1925), 38 U. S. C. A. § 556 (1928). The constitutionality of this statute was upheld in United States v. Hall, 98 U. S. 343 (1878).

[9] Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. 441 (1884); Sallee v. Arnold, 32 Mo. 532 (1862); *cf.* Hayes v. Mass. Mutual Life Ins. Co., 125 Ill. 626, 18 N. E. 322 (1888).

[10] "The theory of the defendant that the act of Congress augments, lessens or makes any change in respect to the duties of a guardian under the State law is entirely erroneous, . . ." Clifford, J., in United States v. Hall, *supra* note 8, at 358. In discussing this case Hutchison, J., in State *ex rel.* Smith v. Board of Com'rs, *supra* note 1, 132 Kan. at 242, 294 Pac. at 920, says, "Punishment for an offense is a regulatory right far different from the responsibility of the government for the performance and fulfillment of a business or financial obligation. Would anyone contend that the government still owes the ward of Mr. Hall, the guardian, for the pension money he misappropriated?"

[11] It appears that in some courts there is a tendency to make of the veterans a privileged class. See Antlers Athletic Ass'n v. Hartung *et al.*, 85 Colo. 125, 274 Pac. 831 (1928), where a legislative act that taxed all boxing matches except those managed by veterans was held not to be discriminatory, and hence to be constitutional, on the ground that soldiers and sailors of the United States, being trained in the art of boxing, would manage such exhibitions better and keep them free from "unseemly quarrels and bickerings." On the other hand see Marallis *et al.* v. City of Chicago *et al.*, 182 N. E. 394 (Ill. 1932), where a statute exempting veterans from the necessity of obtaining peddlers' licenses was held to be unconstitutional on the ground that the classification was unreasonable.

CONFLICT OF LAWS—ADOPTION—RIGHT OF ADOPTED CHILD TO INHERIT FROM NATURAL PARENT—Deceased was divorced by his wife in Michigan, the custody of the son being awarded to her. She remarried, and the son was adopted by her second husband. By the Michigan statute [1] under which the son was adopted, he could inherit from both his natural and his adopting parents. Deceased died intestate in Connecticut, leaving a considerable estate consisting entirely of personal property. The Connecticut statute [2] allowed an adopted child to inherit from his adopting parents, but not from his natural parents. *Held*, that the son was a distributee of his natural father's estate. *Slattery v. Hartford-Connecticut Trust Co.*, 161 Atl. 79 (Conn. 1932).

It is held with practical unanimity that personal property is to be distributed according to the law of the intestate's domicile,[3] which in this case was Connecticut. The Connecticut statute of distribution [4] refers only to "children", without defining what is meant by that term. To aid in the interpretation of this statute, it is necessary to invoke the rule that where there is a limitation upon inheritance by a state governing the inheritance, such limitation is applicable regardless of the law of the state of adoption.[5] The Connecticut statute of adoption [6] provides that "such [adopted] child . . . shall not inherit from his natural parents or their relatives". The court attempted to remove this case from the operation of the rule upon the ground that the son was not asserting an incident which the Michigan law had attached to his status as an adopted child, but that his position was that the effect of the adoption did not destroy his right to inherit from his natural parent. This distinction, however, is at best of dubious validity. Under the court's theory that there is nothing in the public policy of Connecticut opposed to the enforcement of the Michigan law, it should make little difference whether it is a negative or a positive provision of such law which they are enforcing; yet to follow such a doctrine would be opposed to many decided cases, in situations in which the state of adoption imposes greater limitations upon the right to inherit than the state of adoption, when it is held that the limitations of the state of adoption do not apply,[7] and in cases where the state of inheritance has no statute of adoption, where "the adoption would be recognized as a fact, but a fact without significance in the state of inheritance".[8]

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[1] MICH. COMP. LAWS (1929) § 15955, interpreted to this effect by *dictum* in *In re* Klapp's Estate, 197 Mich. 615, 164 N. W. 381 (1917).

[2] CONN. GEN. STAT. (1930) § 4810.

[3] Ennis v. Smith, 14 How. 400 (U. S. 1852); Apple v. Apple, 66 Cal. 432 (1885); Lawrence v. Ketteridge, 21 Conn. 577 (1852); Russell v. Madden, 95 Ill. 485 (1880); CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1931) § 325; STORY, CONFLICT OF LAWS (5th ed. 1857) § 481; DICEY, CONFLICT OF LAWS (4th ed. 1921) § 749; GOODRICH, CONFLICT OF LAWS (1927) § 158.

[4] CONN. GEN. STAT. (1930) § 4980.

[5] Keegan v. Geraghty, 101 Ill. 26 (1881); McCann v. Daly, 168 Ill. App. 287 (1912); see Finley v. Brown, 122 Tenn. 316, 123 S. W. 359 (1909); STORY, *op. cit. supra* note 3, § 481a; GOODRICH, *op. cit. supra* note 3, § 142; TIFFANY, DOMESTIC RELATIONS (3d ed. 1921) § 115. The Restatement phrases this rule a little more broadly: "The status of adoption, created by the law of a state having jurisdiction to create it, will be given the same effect in another state as is given by the latter state to the status of adoption when created by its own law"; CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1930) § 151.

[6] *Supra* note 2.

[7] Anderson v. French, 77 N. H. 509, 511, 93 Atl. 1042, 1043 (1915): "The legality of the adoption is decided by the law of the state where the adoption took place; but that relation or status having been established, what the adopted child shall inherit should be determined in the case of personalty by the *lex domicilii* of the owner at the time of his decease. . . ." See GOODRICH, *op. cit. supra* note 3, § 142.

[8] GOODRICH, *op. cit. supra* note 3, at 328. This was the law in England prior to the Adoption Act of 1926, which, it should be noted, was strictly limited so as not to affect property rights; DICEY, *op. cit. supra* note 3, at 30, 511, 903.

Such an argument as that advanced in this case would, therefore, limit the control which the state has over inheritance. Although the present claimant was adopted under the Michigan statute, he appears before the court as an adopted child,[9] and should be bound by the restrictions which the law of that state places upon inheritance by adopted children. Reading the statute of distribution with the statute of adoption,[10] it appears that the intent of the legislature is that an adopted child is no longer to be considered among the "children" of his natural parents.[11]

CONTEMPT—SUMMARY POWER OVER PUBLICATIONS—NEWSPAPER ARTICLES LIKELY TO OBSTRUCT JUSTICE AS CONTEMPTS—While a complaint of sexual irregularity pending against a rector in an ecclesiastical court was attracting great public notice, the defendant newspapers published statements by the woman concerned that she had been bribed to make false accusations while drunk, and by the rector, charging bribery and corruption on the part of his "traducers". *Held,* that these publications were punishable summarily as a "gross contempt" of the court. *Rex v. The Daily Herald,* [1932] 2 K. B. 402.[1]

In England and generally in the United States the courts have held themselves vested with power to punish summarily as in contempt any publication of which the reasonable tendency is an obstruction of the just administration of a pending proceeding.[2] But though thoroughly in accord in statement and legal basis, the British and American summary powers over publications show in application and practical result striking dissimilarities. The principal case is characteristic of the average English conviction, a punishment called forth by the likelihood that the publication may in some way prejudice the case of a party to a trial, most generally and most severely applied against the sensational press in criminal cases.[3] Among American decisions, on the other hand, such a case is comparatively rare, the overwhelming majority of convictions

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[9] TIFFANY, *op. cit. supra* note 5, at 314.

[10] *Cf.* Fosburgh v. Rogers, 114 Mo. 122, 21 S. W. 82 (1893); *In re* Walworth's Estate, 85 Vt. 322, 82 Atl. 7 (1912).

[11] This situation is not likely to arise very often, because most of the states follow the Michigan rule in allowing an adopted child to inherit from both his natural and his adopting parents; *In re* Roderick's Estate, 158 Wash. 377, 291 Pac. 325 (1930); Patterson v. Browning, 146 Ind. 160, 44 N. E. 993 (1896); Hockaday v. Lynn, 200 Mo. 456, 98 S. W. 585 (1906); *cf.* MASS. GEN. LAWS (1921) c. 210, § 9.

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[1] Precisely why the publications constituted contempts the court does not say. Probably it adopted the theory of the prosecution, that the wide circulation of the statements would serve to prejudice possible witnesses, and public sentiment, in the rector's favor. See principal case, at 410.

[2] Toledo Newspaper Co. v. United States, 247 U. S. 402, 38 Sup. Ct. 560 (1918); OSWALD, CONTEMPT (3d ed. 1910) 91. The fact that the basis of the power has been shown to lie in a "remarkable historical solecism"—FOX, THE HISTORY OF CONTEMPT OF COURT (1927)—has not affected the already too well-settled rule. In a few American jurisdictions summary process against publications is prohibited by statute (Pennsylvania, New York, Kentucky, and South Carolina, see (1931) 79 U. OF PA. L. REV. 497). In many jurisdictions such statutes have been circumvented by the courts. See *infra* note 10. The summary power commits the trial to the judge alone, without a jury, and vests in him unlimited discretion as to punishment. No actual obstruction of justice need be shown. OSWALD, *op. cit supra* 93. No defense is provided by the absence of intent to obstruct, *In re* Independent Pub. Co.. 240 Fed. 849 (C. C. A. 9th, 1917); nor by the truth of the matter published, Patterson v. Colorado, 205 U. S. 454, 27 Sup. Ct. 556 (1907).

[3] Other recent convictions are Rex v. Daily Mirror, [1927] 1 K. B. 845 (publication of photo of prisoner accused of murder before identification), and Rex. v. Evening Standard (1924) 44 T. L. R. 301 (publication of result of newspaper's private investigation of pending murder case).

consisting in punishments for attacks on the judiciary.[4] In actual effect, the British exercise of the summary power is thus confined to a field in which it serves its greatest possible utility[5] while not quelling the press in any matter of general popular agitation. On the contrary, the American practice, while for the most part ignoring obnoxious sensationalism, has frequently served to deny the right publicly to criticize the courts in matters of considerable political and sociological moment,[6] often at the time when such criticism is most spontaneous and valuable.[7] In consequence there has been in America widespread dissatisfaction with the application of summary power to publications, and repeated recommendations that it be emasculated[8] or abolished.[9] Considering the prevailing view of the impotency of legislation to curtail the summary power of the judiciary,[10] it seems scarcely possible that the American

[4] In forty-two out of fifty-eight characteristic convictions in the United States cited at the close of their exhaustive examination of the subject by Nelles and King, *Contempt by Publication* (1928) 28 COL. L. REV. 401 and 525, at 554, and in almost all the more recent American cases examined by the writer, the contempt involved was a criticism of the judiciary. From approximately fifty British cases examined, covering the last thirty years, the writer found only two—Regina v. Gray, [1900] 2 Q. B. 36, and Rex v. The New Statesman (1928) 44 T. L. R. 301—punishing attacks upon judges.

[5] It is admitted on all sides that some regulation of the sensational press is highly necessary. See TAFT, LAW REFORM (1926) 142, for examples as to the obstructive lengths to which newspaper sensationalism has been carried (in a jurisdiction—New York—prohibiting summary process against publications). Taft's conclusion is to the effect that the summary process, because of necessarily intermittent enforcement, cannot help. But the comparative inoffensiveness of the British press seems to indicate that if the contempt process were turned more exclusively in the direction characteristic of the British practice considerable alleviation might be accomplished by the threat of prosecution, if not otherwise.

[6] Criticism of the judiciary is naturally most easily called forth, and most bitter, when based upon deep-seated popular and class dissatisfaction. And it is in precisely such cases that the worst abuses of the contempt process have occurred. In United States v. Sanders, 290 Fed. 428 (W. D. Tenn. 1923) an indefensible conviction resulted from a newspaper protest against an arbitrary enforcement of a labor injunction later held illegal. In State v. Shumaker, 200 Ind. 623, 157 N. E. 769 (1927), a publication of the Anti-Saloon League declaring that members of the state supreme court were violently "wet" and urging the election of "dry" judges was punished as likely to intimidate the court in possible future prohibition cases.

[7] Nelles and King, *supra* note 4, at 550, cogently urge that in times of such deafening clamor for popular attention, public discussion of matters of such vital importance as have been increasingly involved in American contempt convictions is possible and forceful only when the matter is prominently in the public eye, as at the moment when a proceeding is pending; that its denial at such times amounts to a complete thwarting. It would seem, moreover, that the summary process, so confounding to the layman, scarcely serves, especially when flying in the face of aroused popular conviction, to ennoble the judiciary in the public mind.

[8] It has frequently been urged that a jury trial be instituted. See Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts* (1924) 37 HARV. L. REV. 1010, for the history of such efforts.

[9] Such is the tenor of Nelles and King, *supra* note 4, at 551. The authors adduce the fact that the Pennsylvania and New York courts have achieved great respectability without the aid of summary power over critical publications, and that the United States courts existed without it for eighty years. In Seltzer v. State (1930) 31 OHIO L. REP. 394, a county appellate court reversed a conviction, using language implying a flat refusal to apply summary process against *any* publication, on the ground that such process was an inexpedient interference with necessary publicity of popular issues. What will be the effect of this unique decision (by an inferior court in a jurisdiction committed to the general rule) it is impossible to guess.

[10] In most jurisdictions the summary process has on the ground of separation of powers been asserted (erroneously) as a constitutionally basic power of the courts, and as such has in some cases already survived legislative prohibition. See Nelles and Cook, *supra* note 4. It is not yet clear what power Congress has over the Federal courts in this respect, though a requirement of jury trial in cases of violation of labor injunctions has been sustained. Michaelson v. United States, 266 U. S. 42, 45 Sup. Ct. 18 (1924). See generally Frankfurter and Landis, *supra* note 8.

courts would permit its statutory destruction. There is evident in recent decisions, nevertheless, a relieving tendency toward retrenchment upon the free manner in which the rule has previously been invoked.[11] Meanwhile, comparison of English experience with our own indicates that the efficiency of the American contempt process as applied to publications will best be served by a redirection of its application—its increased use with respect to the excesses of the sensational press in criminal cases, and its employment with far more hesitancy and sociological discrimination than at present against critics of the courts.

CONTRACTS—SEALED INSTRUMENTS—OPENING OF JUDGMENT—THE SEAL AS A MERE PRESUMPTION OF CONSIDERATION—A judgment entered by confession on a non-negotiable judgment note under seal was opened generally on petition alleging forgery and want of consideration. On trial, a compulsory nonsuit was granted because genuineness of defendant's signature and consideration to him from the plaintiff had not been proved. Plaintiff appealed. *Held,* that there was sufficient evidence of genuineness which, by itself, entitled plaintiff to go to the jury; that the seal imports consideration, but where the judgment has been opened generally, defendant may raise the question of consideration despite presence of the seal.[1] *Austen v. Marzolf,* 307 Pa. 232, 161 Atl. 72 (1932).

Although the sanctity of the seal in Pennsylvania remains unimpaired by statutory[2] modification, it has been derogated substantially by the adjudications of the courts. An early encroachment[3] was made by the law courts in allowing the equitable defense of failure[4] of consideration under the plea of payment. Two inroads of a more derogatory nature have resulted from constant use of the inaccurate[5] statement that "a seal imports[6] a consideration". With this

[11] Recent Federal cases, particularly, have been increasingly stringent in requiring a showing of considerable likelihood of obstruction. See Cornish v. United States, 299 Fed. 283 (C. C. A. 6th, 1924). Other decisions have recommended that in cases in which the contempt consists in a criticism of a judge other judges be called to try the case, see Cooke v. United States, 267 U. S. 517, 539, 45 Sup. Ct. 390, 396 (1925), and have urged with increasing feeling that the summary power be applied only in cases of strict necessity. See the language in United States v. Sullens, 36 F. (2d) 230, 239 (S. D. Miss. 1929).

[1] The court allowed the petition to open judgment to stand as defendant's affidavit of defense.

[2] For a list of states that have statutes and the effect of such statutes, see 1 WILLISTON, CONTRACTS (1920) §§ 218, 219.

[3] Swift v. Hawkins, 1 Dall. 17 (Pa. 1768). The court ruled that, "there being no court of chancery in this province, there is a necessity, in order to prevent a failure of justice, to let defendants . . . prove mistake or want of consideration". The Chief Justice commented that he had known this to be the constant practice for thirty-nine years. The court really meant failure of consideration. See interpretation of Yeates, J., in Smith v. Evans, 6 Binn. 102, 111 (Pa. 1813).

[4] Courts have had considerable difficulty in distinguishing lack of consideration from failure of consideration. The former signifies that no consideration was ever intended to be given for the promisor's covenant, while the latter occurs where a consideration was contemplated as a prerequisite to the promisor's liability, and has never been received by him. At strict common law, failure of consideration was not admissible as a defense at law. Hartshorn v. Day, 60 U. S. 211, 222 (1856). AMES, SPECIALTY CONTRACTS AND EQUITABLE DEFENSES, LECTURES ON LEGAL HISTORY (1913) 108, and 109 n. 1. However, failure of consideration is a good defense in both law and equity in Pennsylvania. Yard v. Patton, 13 Pa. 278 (1850); Meek v. Frantz, 171 Pa. 632, 33 Atl. 413 (1895); Anderson v. Best, 176 Pa. 498, 500, 35 Atl. 194 (1896). Lack of consideration classically was no defense to a sealed obligation. Cosgrove v. Cummings, 195 Pa. 497, 46 Atl. 69 (1900); see Dominion Trust Co. v. Ridall, 249 Pa. 122, 124, 94 Atl. 464, 465 (1915).

[5] "A consideration is not inferred from the fact of execution of a sealed instrument. No consideration is necessary to give validity to a deed. It derives its efficacy from the solemnity of its execution—the acts of sealing and delivery—not upon the idea that the seal imports a consideration". Walker v. Walker, 35 N. C. 335, 336 (1852).

premise, a line of decisions has developed the deduction that if there is any evidence to impeach the *bona fides*[7] of the transaction, full proof of consideration may be required. The second inroad resulting from this unfortunate terminology is the permission given, after a judgment is opened without terms,[8] to plead any legal defense,[9] want of consideration [10] being admissible thereunder. The instant case might fall within either of these exceptions, but it belongs more specifically under the latter. Though the decision might be justifiable on the ground that lack of consideration is admissible merely as evidence to shed light upon the relation between the parties pointing to the likelihood of forgery,[11] the tenor of the court's language seems to be that proof of a lack of consideration would be a complete defense to the suit. Such a result thoroughly abrogates the efficacy of the seal and cannot be supported.[12] In view of the desirability [13] of having some formula or formality in our law which will give legal *status* to agreements where a party intends to be legally bound without consideration, it is regrettable that the courts have violated the sanctity of the seal by judicial legislation.

CONVERSION—MEASURE OF DAMAGES—VALUE OF RECOVERY FOR WRONGFUL DETENTION BY BONA FIDE HOLDER OF STOCK CERTIFICATE BEARING FORGED ENDORSEMENT—Defendant had purchased in good faith share certificates bearing the forged endorsement of plaintiff's testator from whom they had been stolen. The corporation had been notified of the theft and the deceased remained the registered owner and received dividends. On defendant's refusal to deliver the certificates to plaintiff this action in conversion for the value of the shares was begun. *Held* (one judge dissenting),[1] that plaintiff recover the value of the shares less dividends received.[2] *Pierpoint v. Hoyt et al.*, 260 N. Y. 26, 182 N. E. 235 (1932).[3]

[6] Yard v. Patton, *supra* note 4; Mack's Appeal, 68 Pa. 231 (1871). But see Lewis, C. J., in Candor and Henderson's Appeal, 27 Pa. 119, 120 (1856), in which he recognizes the true rule to be that in a bond, no consideration is necessary if none was contracted for.

[7] Hancock's Appeal, 34 Pa. 155 (1859); Twitchell v. McMurtrie, 77 Pa. 383 (1875); Jeffers v. Babis, 304 Pa. 281, 155 Atl. 878 (1931).

[8] Though an application for a rule to open is generally resorted to because of its convenience in practice, a petition in equity is also used; in either form the relief demanded is in equity. Koch v. Biesecker, 7 Pa. Super. 37 (1898); Pfaff v. Thomas, 3 Pa. Super. 419 (1897). Once the judgment has been opened, however, the case goes to trial before a jury, petitioner becoming the party defendant.

[9] Once the judgment has been opened without terms, it is competent for defendant to make any legal defense, and plaintiff is put to proof of his cause of action precisely as if no judgment had been entered. This rule was first applied in Dennison v. Leech, 9 Pa. 164 (1848) to open a judgment on default incorrectly entered, and was then applied to a judgment by confession on a note not under seal. Sossong v. Rosar, 112 Pa. 197, 3 Atl. 768 (1886); Harris v. Harris, 154 Pa. 501, 26 Atl 617 (1893). Its next application was to judgment notes under seal in Shannon v. Castner, 21 Pa. Super. 294 (1902), which was approved in Long v. Morningstar, 212 Pa. 458, 61 Atl. 1007 (1905).

[10] Long v. Morningstar, *supra* note 9; Steel v. Snyder, 295 Pa. 120, 144 Atl. 912 (1929).

[11] In Burkholder v. Plank, 69 Pa. 225 (1871), an action on a sealed promissory note, it was held that want of consideration was material to the inquiry as to fraud in plaintiff in obtaining defendant's signature. In Steel v. Snyder, *supra* note 10, it was said that the defense being forgery, as to that the seal had no bearing.

[12] See Piper v. Queeney, 282 Pa. 135, 142, 127 Atl. 474, 477 (1925).

[13] Reeve, *The Uniform Written Obligations Act* (1928) 76 U. OF PA. L. REV. 580.

[1] Judge Lehman dissented in an opinion.

[2] These dividends were received after the conversion. The court also decreed that the plaintiff execute the necessary documents to transfer good title to the shares to the defendants on their satisfying the judgment.

[3] Reversing Pierpoint v. Farnum *et al.*, 234 App. Div. 205, 254 N. Y. Supp. 758 (1931).

A share certificate is generally considered to be merely evidence of shareholdership in the corporation which issues it.[4] The facts constituting a conversion of the shares may include a conversion of the share certificate,[5] but a conversion of the shares should not inevitably result from the conversion of the paper. The court points out that conversion is concerned with possession, not title,[6] but possession of intangible property is at best merely a fictional concept. The "possessor" of shares of stock has nothing physical in his control. His "possession" is defined by the rights, privileges and other legal incidents flowing from his interest. It was only one of these attributes that the defendant interfered with, namely, the right to possession of the share certificate. This deprivation, however, resulted in the plaintiff's inability to effect a transfer, valid as to third persons, of his interest under the *Uniform Stock Transfer Act*, which requires delivery of the certificate to accomplish a transfer.[7] Although a transfer of the interest might perhaps be made, still the field of potential purchasers would be materially limited by the necessity, due to this limited effect of the transfer, of proceeding outside the regular commercial channels. Even though a substitute certificate might be obtained [8] the necessary "red tape" in such proceedings would delay and inconvenience the plaintiff. The ready marketability of shares being, from an investor's point of view, one of the prime attributes of such securities, an interference with the property lessening such liquidity should, under the modern view of conversion,[9] be sufficient to support an action of this type and permit recovery by the plaintiff of the full value of the shares.[10] Although the instant court did not attempt a very deep analysis of the situation, its holding seems justified.[11]

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[4] See Richardson v. Shaw, 209 U. S. 365, 378, 28 Sup. Ct. 512, 516 (1908); Gorman v. Littlefield, 229, U. S. 19, 23, 33 Sup. Ct. 690, 691 (1913); Zander v. New York Security and Trust Co., 178 N. Y. 208, 212, 70 N. E. 449, 451 (1904); MEYER, THE LAW OF STOCK BROKER AND STOCK EXCHANGE (1931) § 67.

[5] See McAllister v. Kuhn, 96 U. S. 87 (1877); Payne v. Elliot, 54 Cal. 339 (1880); Anderun v. Nicholas, 28 N. Y. 600 (1864); 11 FLETCHER, CYCLOPEDIA OF CORPORATIONS (Perm. ed. 1932) § 5113 and cases there cited. Pennsylvania did not recognize shares of stock as capable of conversion. Neiler & Warren v. Kelley, 69 Pa. 403, 407 (1871). But see Gervis v. Kay, 294 Pa. 518, 144 Atl. 529 (1928).

[6] Principal case at 29, 182 N. E. at 236.

[7] 6 U. L. A. (1922) § 1; N. Y. PERS. PROP. LAW (1909) § 162.

[8] This fact is suggested as a controlling one by the Appellate Division in Pierpoint v. Hoyt, *supra* note 3 at 209, 254 N. Y. Supp. at 762.

[9] "The natural meaning of converting property to one's own use has long been left behind. It came to be seen that the actual diversion of the benefit arising from use and possession was only one aspect of the wrong, and not a constant one. It did not matter to the plaintiff whether it was the defendant, or a third person taking delivery from the defendant, who used his goods, or whether they were used at all; the essence of the injury was that the use and possession were dealt with in a manner adverse to the plaintiff and inconsistent with his right of dominion." POLLOCK, TORTS (13th ed. 1929) 372; Suzuki v. Small, 214 App. Div. 541, 212 N. Y. Supp. 589, *aff'd* 243 N. Y. 590, 154 N. E. 618 (1925); Booth v. New York Central R. Co., 95 Vt. 9, 112 Atl. 894 (1921).

[10] It is to be noticed that the court in Pardee v. Nelson, 59 Utah 497, 205 Pac. 332 (1922), as well as in the other cases cited in that opinion, did not adopt this view, nor, apparently, did Judge Lehman in his dissent. See also Pierpoint v. Farnum, *supra* note 3, at 209, 254 N. Y. Supp. at 763. Dagget v. Davis, 53 Mich. 35, 18 N. W. 548 (1884) is probably distinguishable in that there a transfer of the shares could have been effected without a delivery of the certificate.

[11] The court based its decision upon its assumption that the share certificate was, at least for the purposes of this case, identical with the interest and conversion of the shares resulted *ipso facto* from a conversion of the certificate. See principal case at 29, 182 N. E. at 235. This is a departure from the existing practice, *supra* note 4, which could have been avoided by the reasoning outlined in this comment.

CORPORATIONS—TRANSFER OF ALL CORPORATE ASSETS AS AMOUNTING TO CONSOLIDATION—RIGHTS OF DISSENTING MINORITY SHAREHOLDERS—Majority shareholders in corporation *A*, in which plaintiffs held 18/100 of 1 per cent. of total stock, voted to "consolidate" with corporation *B*, forming a new corporation *C*. The assets of *A* and *B* were to be turned over to *C*, and in payment therefor the stock of *C* was to be distributed among the shareholders of *A* and *B* on a share for share basis. Corporation *A* had been highly profitable, while corporation *B* was financially embarrassed. Plaintiffs prayed for an injunction restraining the "consolidation," forbidding the dissolution of corporation *A*, and preventing the transfer of its assets. *Held*, that plaintiffs were not entitled to the relief sought, but might at their option take cash for the highest value of their shares, or exchange them for shares in the new corporation. *Paterson et al. v. Shattuck Arizona Copper Co. et al.*, Minn. Sup. Ct., U. S. Daily, Sept. 16, 1932, at 1326.

The consolidation of one corporation with another requires statutory authority,[1] and without it an attempt at consolidation is usually regarded as *ultra vires* and void.[2] In the instant case the court avoided the application of this strict rule by treating the transaction as a sale of all the corporate assets.[3] Some courts require the unanimous consent of the shareholders to a transfer of all the property of a prosperous corporation,[4] either because a majority could not work a dissolution at common law,[5] or because such a sale violates the contract among the shareholders to continue in business so long as it is profitable.[6] Other jurisdictions,[7] by statute [8] or otherwise, permit the majority to sell out for cash whenever sound business policy so dictates,[9] and this view is approved by the Minnesota court. These rules of law are not strictly pertinent, as the court

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[1] See Hall, *State Control of Consolidation of Public Utilities* (1932) 81 U. OF PA. L. REV. 8, 11. The instant case is not affected by statute, as the court states at 1334. The Minnesota statute authorizing consolidation was not passed until two years after the action was instituted. MINN. STAT. (Mason, 1927) § 7457-12.

[2] First State Bank of Mangum v. Lock, 113 Okla. 30, 237 Pac. 606 (1925); 15 FLETCHER, CYC. CORPORATIONS (Perm. ed. 1931) § 7048; 8 THOMPSON, CORPORATIONS (3d ed. 1927) § 6020. A subsequent statute will not validate the consolidation. American Loan & Trust Co. v. Minnesota & N. W. R. Co., 157 Ill. 641, 42 N. E. 153 (1895).

[3] A consolidation is usually held to dissolve the constituent corporations. Clearwater v. Meredith, 1 Wall. 25 (U. S. 1863); McMahan v. Morrison *et al.*, 16 Ind. 172 (1861); 8 THOMPSON, *op. cit. supra* note 2, § 6016. Likewise a sale of all the corporate assets is treated as effecting a dissolution; see Abbot v. American Hard Rubber Co., 33 Barb. 578, 590 (N. Y. 1861); although the corporation's legal existence may continue; Price v. Holcombe, 89 Iowa 123, 56 N. W. 407 (1893); 8 THOMPSON, *op. cit. supra* note 2, §§ 6444, 6447.

[4] Barton v. Enterprise Loan & Building Ass'n, 114 Ind. 226, 16 N. E. 486 (1887); Abbot v. American Hard Rubber Co., *supra* note 3; 13 FLETCHER, *op. cit. supra* note 2, § 5797.

[5] This theory is followed in the leading American case of Abbot v. American Hard Rubber Co., *supra* note 3, and is based on a *dictum* in Ward v. Society of Attorneys, 1 Coll. 370, 379 (Eng. 1844). But see Warren, *Voluntary Transfers of Corporate Undertakings* (1916) 30 HARV. L. REV. 335.

[6] Kean v. Johnson, 9 N. J. Eq. 401 (1853). Most cases requiring unanimous consent follow this leading case. Note (1930) 78 U. OF PA. L. REV. 881.

[7] Tanner v. Lindell R. R., 180 Mo. 1, 79 S. W. 155 (1903); Bowditch v. Jackson Co., *et al.*, 76 N. H. 351, 82 Atl. 1014 (1912); Note (1920) 7 VA. L. REV. 640. But where the corporation is insolvent or operating at a loss the majority may sell in almost all states. Allaun v. Consolidated Oil Co. *et al.*, 16 Del. Ch. 318, 147 Atl. 257 (1929); (1930) 78 U. OF PA. L. REV. 423. To force the majority to continue under these conditions would be contrary to common sense and elementary business principles. Treadwell v. Salisbury Mfg. Co., 7 Gray 393 (Mass. 1856).

[8] For a list of such statutes see Warren, *supra* note 5, at 347.

[9] But minorities will be protected against fraud regardless of the financial condition of the corporation. Cantwell v. Columbia Lead Co., 199 Mo. 1, 97 S. W. 167 (1906); Kidd v. New Hampshire Traction Co., 72 N. H. 273 (1903); 13 FLETCHER, *op. cit. supra* note 2, § 5829.

itself admits,[10] for this was not a sale for cash, but an exchange of stock [11] or a gift of the assets,[12] and in either case minority shareholders are usually granted relief. The real basis of the decision is the court's feeling that it would be unjust to allow so small a minority to prevent the consummation of the undertaking. While the result may have been desirable in the particular case, the opinion would have been more convincing if it had rested upon the purely equitable ground suggested, and omitted all references to inapplicable rules of law.

CORPORATIONS—VALIDITY OF DIRECTORS VOTING STOCK TO THEMSELVES AFTER SUBMISSION OF "FORMULATED PLAN" TO STOCKHOLDERS—By statute [1] a corporation could issue stock to employees if the stockholders approved of a formulated plan upon such issue submitted by the directors. The plan here approved stated that the shares were to be sold at par, although the market value was more than three times as great, and to such employees as the directors themselves shall determine. After approval, the directors, who were also executives in the company, issued more than half of the stock to themselves. The complainant, a shareholder, seeks the cancellation of the shares thus issued. *Held* (one justice dissenting), that as there was no evidence of fraud the complainant's bill must be dismissed. *Rogers v. American Tobacco Company,* 60 F. (2d) 114 (C. C. A. 2d, 1932).[2]

Directors have always been held to be fiduciaries for the corporation, so that they cannot make any secret profit [3] or acquire an adverse interest while acting for the corporation.[4] So strictly is this principle adhered to that the courts will scrutinize all transactions in which the director dealt with the corporation as an individual,[5] and may set them aside merely because of the rela-

[10] At 1334.

[11] Minority stockholders are not compelled to take shares in the purchasing corporation. Jones v. Missouri Edison Co., 144 Fed. 765 (C. C. A. 8th, 1906); Koehler v. St. Mary's Brewing Co., 228 Pa. 648, 77 Atl. 1016 (1910). *Contra:* Treadwell v. Salisbury Mfg. Co., *supra* note 7. The court in the instant case follows the better view in allowing the plaintiffs to recover the cash value of their shares, for to require them to take shares in a corporation other than their own would be subjecting them to the perils of an enterprise other than that upon which they had contracted to embark.

[12] It will be observed that the plaintiffs' corporation has disposed of its assets without receiving any consideration; the consideration has passed to the shareholders. So far as the corporation was concerned, therefore, the transaction was a gift, and in such cases relief is usually given the minority shareholders who oppose the gift. Dalsheimer v. Graphic Arts Corp., 86 N. J. Eq. 49, 97 Atl. 497 (1916); see Finch v. Warrior Cement Corp., 16 Del. Ch. 44, 55, 141 Atl. 54, 59 (1928). But in the instant case the court was unwilling to go so far. Equitable relief should be molded to fit the facts, and the court found a way to give the plaintiffs adequate relief without destroying all that the defendants had created, for the granting of the drastic remedies demanded by the plaintiffs would have inflicted tremendous losses on all the corporations and on the majority shareholders.

[1] N. J. COMP. STAT. (Supp. 1924) p. 697.

[2] Writ of *certiorari* has been granted by the Supreme Court, October 18, 1932.

[3] Camden Land Co. v. Lewis, 101 Me. 78, 63 Atl. 523 (1905); Malden and Melrose Gas Co. v. Chandler, 209 Mass. 354, 95 N. E. 791 (1911). Nor can they acquire any personal advantage not enjoyed by other stockholders, Kelsey v. New England Ry. Co., 62 N. J. Eq. 742, 48 Atl. 1001 (1901); Greenville Gas Co. v. Reis, 54 Ohio St. 549, 44 N. E. 271 (1896). If they do so they may be compelled to account therefor to the corporation, Chicago Hansom Cab. v. Yerkes, 141 Ill. 320, 30 N. E. 667 (1892); Loudenlager v. Woodbury Heights Land Co., 55 N. J. Eq. 78, 35 Atl. 436 (1896).

[4] Fricker v. Americus Co., 124 Ga. 165, 52 S. E. 65 (1905); Center Creek Water Co. v. Lindsay, 21 Utah 192, 60 Pac. 559 (1900); *cf.* Kidder v. Witler-Corbin Co., 38 Wash. 179, 80 Pac. 301 (1905).

[5] Such contracts "should be scanned, if not with suspicion, at least with the most scrupulous care", Hubbard v. New York Inv. Co., 14 Fed. 675, 676 (D. Mass. 1882); Mobile Land Improvement Co. v. Glass, 142 Ala. 520, 39 So. 229 (1904).

tionship of the parties whether they were fair or unfair.[6] Again, there has been a recent tendency to hold directors as fiduciaries for the shareholders.[7] Thus, it has been held that directors cannot purchase stock from shareholders without giving them the benefit of any official knowledge they may possess which may increase the value of the stock,[8] and that stockholders may compel the directors to declare a dividend,[9] and that they may also enjoin the issue of new stock, the purpose of which is to change the control of the enterprise, even though the issue may not injure the corporation.[10] The courts thus have shown a strong policy carefully to define the fiduciary obligations of directors, with which the instant case, however, is not in accord.[11] Had it held that the directors were under a duty to disclose that they were to benefit mostly by the plan, it would have more definitely established the fiduciary obligations of directors, and gone far to assure investors in the largest form of business today that their interests will not be disregarded by those in control.[12]

COURTS—EFFECT OF DISTRICT COURT RULES ON JURISDICTION OF JUDGE OF CIRCUIT COURT OF APPEALS AS DESIGNATED DISTRICT JUDGE—Acting under statutory authority,[1] a senior Federal circuit judge designated himself, by his

[6] 4 FLETCHER, CYCLOPEDIA CORPORATIONS (1918) 3589: "No principle in the law of corporations, therefore, is founded on sounder reasons or more surely settled, than the principle that the directors, trustees or other officers of a corporation who are intrusted with its interests, and occupy a fiduciary relation towards it will not be allowed to contract with the corporation directly or indirectly. . . . In such a case the transaction is at least voidable at the option of the corporation." Goodell v. Verdugo Cannon Water Co., 138 Cal. 308, 71 Pac. 354 (1903); Heggins v. Lansingh, 154 Ill. 301, 40 N. E. 362 (1895). And this despite the doctrine of refraining from interfering with the internal management of corporations. See Godley v. Crandall & Godley Co., 212 N. Y. 121, 131, 105 N. E. 818, 821 (1914).

[7] "That directors are fiduciaries for the corporation is indisputable. That many of their powers, such as the power of declaring or passing dividends and the power of issuing new stock, may effect the individual interests of the stockholders rather than the corporate enterprise is obvious and has led to a growing tendency to treat directors as fiduciaries for the stockholders as well as the corporate entity." Dodd, *For Whom Are Corporate Managers Trustees* (1932) 45 HARV. L. REV. 1145, 1147 n. 6. See Berle, *For Whom Corporate Managers Are Trustees* (1932) 45 HARV. L. REV. 1365.

[8] Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232 (1903); Dawson v. National Life Ins. Co., 176 Iowa 362, 157 N. W. 929 (1916). *Contra:* Bowden v. Taylor, 254 Ill. 464, 98 N. E. 941 (1912).

[9] Dodge v. Ford Motor Co., 204 Mich. 459, 170 N. W. 668 (1919).

[10] Elliott v. Baker, 194 Mass. 518, 80 N. E. 450 (1907); see Dunlay v. Avenue M Garage, 253 N. Y. 274, 279, 170 N. E. 917, 919 (1930).

[11] The case of Rogers v. Hill, 60 F. (2d) 109 (C. C. A. 2d, 1932), between the same parties and decided on the same day as the instant case presented the same problem. A by-law of 1912 provided that 2½ per cent. of the annual net profits of the company be distributed to the president (Hill) in addition to his fixed salary of $168,000. The business of the corporation increased so remarkably that this bonus increased from $90,000 in 1921 to $840,000 in 1930. The complainant sought to set this bonus aside on the ground that it is so much beyond fair compensation as to make a by-law which sanctioned it *prima facie* unreasonable and hence unlawful. The court held (Swann, J., again dissenting) that as there was no fraud the complainant's bill must fail.

[12] The possibility of relief from the directors' action is limited by the fact that ratification of such action by the majority of the shareholders, even after a suit had been brought by a dissenting stockholder, has been held to bind the minority. Putnam v. Juvenile Shoe Corp., 307 Mo. 74, 269 S. W. 593 (1925), 40 A. L. R. 1412 (1926); *cf.* Gorell v. Greenlees, 104 Kan. 693, 180 Pac. 798 (1919). See Lattin, *The Minority and Intra-Corporate Conflict* (1932) 17 IOWA L. REV. 313.

[1] Section 18 of the Judicial Code. "The Chief Justice of the United States, or the circuit justice of any judicial circuit, or the senior circuit judge thereof, may, if the public interest requires, designate and assign any circuit judge of a judicial circuit to hold a district court within such circuit. . . . During the period of service of any judge designated and assigned under this chapter, he shall have all the powers and rights, and perform all the duties of a judge of the district, or of a justice of the court, to which he has been assigned." 42 STAT. 839 (1922), 28 U. S. C. A. § 22 (1926).

own order, to hold a district court. Thereupon, acting as a district judge, he disagreed with the division of business in the District Court, and as senior circuit judge, by another order, directed that applications for the appointment of receivers might be made, not only to the judge designated by the District Court, but also to himself designated to hold a district court.[2] Then, acting as a district judge, upon application made to him, he appointed equity receivers, in alleged violation of Rules of the District Court. A rule was taken in the District Court to show cause why, *inter alia,* his orders should not be vacated. *Held,* that the District Court was without jurisdiction to consider the Designation Order, but that it had jurisdiction over his order appointing a receiver; and that he was an intruding judge, and, therefore, the order was void and should be vacated. *Johnson v. Manhattan Ry. Co., Interborough Rapid Transit Co., et al.,* U. S. Daily, October 25, 1932, at 1542 (S. D. N. Y. 1932).

The status of the Circuit Judge in the District Court was either that of a judge *de jure,* a judge *de facto,* or an intruding judge.[3] Since the court held that it had no jurisdiction over the Designation Order,[4] it follows that the Circuit Judge must be regarded, for the purposes of the present case, as a district judge *de jure.* The court, however, reasoned that since the Circuit Judge was not assigned to hear motions by the Senior District Judge under General Rule 1a of the District Court,[5] he was not a *de jure* motion judge; and since a motion judge had been assigned under this rule, the impossible situation was created, by reason of General Rule 11a,[6] of a *de jure* motion judge and a *de facto* motion judge functioning at the same time. Thus, the court concluded that the designated judge must be regarded as an intruding judge,[7] and therefore, his order, being void, must be vacated. The Senior Circuit Judge, in a memorandum filed in the District Court several days later,[8] in reply to this opinion, maintained that since he was acting in the public interest,[9] he had,

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[2] Under Section 23 of the Judicial Code. "In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and assignment of cases for trial in said district." 36 STAT. 1090 (1911), 28 U. S. C. A. § 27 (1926).

[3] "An officer *de facto* is one who exercises the duties of an office, under color of an appointment or election to that office. He differs, on the one hand, from a mere usurper of an office, who undertakes to act as an officer without color of right; and, on the other hand, from an officer *de jure* who is, in all respects, legally appointed and qualified to exercise the office." Plymouth v. Painter, 17 Conn. 585, 588 (1846). See also Hamlin v. Kassafer *et al.,* 15 Ore. 456, 458, 15 Pac. 778, 780 (1887): MECHEM, PUBLIC OFFICES AND OFFICERS (1890) § 316, *et seq.*

[4] The court so held because the order was made by the Senior Circuit Judge, and it had no jurisdiction when he acted in that capacity; but it had jurisdiction over his orders while acting under the designation to hold a district court, for therein he acted as a district judge.

[5] "Any judge designated to sit in the District Court for the Southern District of New York shall do such work only as may be assigned to him by the senior district judge." General Rule 1a of the United States District Court for the Southern District of New York.

[6] "All applications for the appointment of receivers in equity causes, in bankruptcy causes, and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the bankruptcy rules), shall be made to the judge assigned to hold the bankruptcy and motions part of the business of the court and to no other judge." General Rule 11a of the United States District Court for the Southern District of New York.

[7] See United States v. Alexander *et al.,* 46 Fed. 728, 729 (D. Idaho 1891); Hamlin v. Kassafer *et al., supra* note 3, at 459, 15 Pac. at 780. See also MECHEM, *op. cit. supra* note 3, § 322.

[8] U. S. Daily, November 3, 1932, at 1598 (S. D. N. Y. 1932). The occasion for the opinion was the request by the deposed receivers for instructions.

[9] The Circuit Judge in his memorandum, *supra* note 8, stated that it had been the practice of this District Court to appoint a designated trust company as receiver in bankruptcy and equity proceedings, and the appointment of such a receiver in this case would be against the public interest, since the situation, involving the running of a railway, the investment of a huge amount of capital, the employment of 18,000 employees, the convenience of millions of

under the Judicial Code, properly designated himself to hold a district court.[10] He then argued that the Rules of the District Court, invoked by the District Judge, limiting the hearing of certain cases to named judges, unduly restricted the jurisdiction vested in him, as senior circuit judge, by Act of Congress;[11] and that a district court has no authority, directly or indirectly, by a rule or agreement among the judges, to abrogate or modify an Act of Congress.[12] The argument of the Circuit Judge that these rules are invalid appears sound, and would seem to be a compelling answer to the assumption by the District Judge that General Rule 11a creates the office of motion judge with the exclusive power to hear applications for the appointment of receivers.[13] Therefore, since any district judge may act as motion judge, there can be no basis for the distinction between *de jure* and *de facto* motion judges. Even granting, however, that the rules are valid, it would not follow that their disregard by the Circuit Judge made him an intruding judge. The court has overlooked the principal applied by Federal courts that the failure or refusal of a judge to observe the rules of his own court is not reversible error.[14] *A fortiori,* it should not affect his very status as a judge so as to render him an intruder. Therefore, applying the principle that a judge should not vacate the order of another judge of equal rank,[15] the District Judge should not have vacated the order appointing receivers. The ultimate question still remains whether this exercise of power by the Senior Circuit Judge, under Section 18 of the Judicial Code, was proper. Since his conduct is not reviewable by the District Court,[16] the proper procedure was to except to the authority to make any order or decree under the Designation Order, and thus make it the subject of review in due course of law.[17] It was not within the power of a district court to remedy the confusion created by this situation; and certainly it should not itself indulge in exceeding its powers in an attempt, by indirection, to correct what it considers an abuse of

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users, was such that individual receivers skilled in this business and able to devote their whole time and efforts were needed, and the usual trust company receiver would not be able adequately to discharge the duties. The District Court had refused to make an exception to its practice in a similar case in the past, and Senior Circuit Judge considered it his duty, in the public interest to designate himself to hold a district court and appoint such receivers as he considered capable to handle the affairs of the railway.

[10] He reasoned that under Section 18 of the Judicial Code, a senior circuit judge may, in the public interest, designate a circuit judge to hold a district court, and that, thereupon, the circuit judge was vested with all the powers, rights and duties of a district judge; that such powers had, prior to 1922, frequently been exercised in his and other circuits, and, therefore, when this provision was re-enacted in 1922, Congress must have intended that these powers should be so exercised; and that it is not merely his privilege to exercise these powers when he deems the public interest requires it, but, indeed, it is his duty to do so.

[11] It would seem clear that these rules serve to nullify the effect of any designation order made under Section 18 of the Judicial Code. However great the public interest may be, the senior district judge, by failing or refusing to assign the designated judge any business of the court, may defeat such public interest and the intent of Congress as expressed in the Act.

[12] This limitation on the power of the district courts to make rules is set forth in the very section of the Code which grants the rule making power: "The district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or within any rule prescribed by the Supreme Court under section 730 of this title, make rules and orders. . . ." REV. STAT. § 918, 28 U. S. C. A. § 731 (1926). See also Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co., 263 U. S. 629, 635, 44 Sup. Ct. 220, 222 (1923).

[13] Principal case at 1544.

[14] United States v. Breitling, 20 How. 252 (U. S. 1857); Life Insurance Co. v. Francisco, 17 Wall. 672 (U. S. 1873); Southern Pacific Co. v. Johnson, 69 Fed. 559 (C. C. A. 9th, 1895).

[15] The court in the principal case enunciated this principle at 1544.

[16] *Supra* note 4.

[17] *Ex parte* American Steel Barrel Company and Seaman, 230 U. S. 35, 45, 33 Sup. Ct. 1007, 1010 (1912).

power by a senior circuit judge.[18] If the objection is to the power granted by Section 18 of the Judicial Code, the remedy lies in amendment by Congress.

GIFTS—EFFICACY OF DELIVERY OF SAVINGS DEPOSIT BOOK TO ESTABLISH GIFT CAUSA MORTIS—*G*, anticipating death because of a serious illness, handed to *M* two savings deposit books in *G's* name, stating that "if he did not come back [from the hospital] they should be hers." *G* died. *Held,* that there was no gift *causa mortis* of the savings accounts. *Grigonis's Estate,* 307 Pa. 183, 160 Atl. 706 (1932).

A chose in action, evidenced by a written instrument, the title to which, either legal or equitable, can be transferred by delivery, may be the subject of a valid gift *causa mortis*.[1] The influence of equity has wrought such a change in the law of delivery [2] that, notwithstanding the non-observance of all formalities, such instruments as bonds,[3] stock [4] and deposit certificates,[5] unendorsed notes,[6] agreement to sell land,[7] insurance policies,[8] have been held to be transferable without assignment or endorsement thereof. In *Walsh's Appeal,*[9] on which the decision in the instant case is based, the Pennsylvania court, contrary to the weight of authority,[10] refused to extend this doctrine to a savings deposit book,[11] stating that delivery had to be accompanied by a written assignment.[12]

[18] It might seem desirable that the district court should have the power to protect itself from what it considers as intrusions, but since Congress has decided that it may be subjected to such "intrusions", it would not be advisable to allow the district court such powers as would enable it to nullify the expressed will of Congress.

[1] 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1914) § 1148, and cases cited, n. 1 g; CONTRACTS RESTATEMENT (Am. L. Inst. 1928) § 158 (1b). Under the "best evidence" rule, such a writing, unless its absence were accounted for, would be the only competent evidence of the provisions of the contract. 2 WIGMORE, EVIDENCE (2d ed. 1923) § 1177, and cases cited, n. 23; Moore v. Darton, 4 DeG. & S. 517 (Ch. 1851), which is cited and followed for this principle in *In re* Dillon, 44 Ch. 76 (1890); Duckworth v. Lee, 1 Ir. R. 405 (1899); *In re* Weston, 1 Ch. 680 (1902); for the development of this doctrine in English law, see Bruton, *Delivery as Applied to Gifts of Choses in Action* (1930) 39 YALE L. J. 837. A typical American case is Camp's Appeal, 36 Conn. 88 (1869).

[2] 2 SCHOULER, PERSONAL PROPERTY (3d ed. 1896) § 147; THORNTON, GIFTS AND ADVANCEMENTS (1893) § 270. "The celebrated case of *Duffield v. Elwes,* 1 Bligh [N. S.] 497 (1827), . . . appears to have been the turning point in the English law of delivery; . . . and Lord Hardwicke's distinction [in Ward v. Turner, 2 Ves. Sen. 431, at 443 (1751)] between the delivery of property and the delivery of its evidence has assuredly lost its point." 2 SCHOULER, *op. cit. supra* § 168; 2 KENT, COMMENTARIES (14th ed. Gould, 1896) *447; for an exhaustive review of authorities bearing on transfer of choses in action without written evidence thereof, see Leyson v. Davis, 17 Mont. 220, 42 Pac. 775 (1895).

[3] Wells v. Tucker, 3 Binn. 366 (Pa. 1811); Licey v. Licey, 7 Pa. 251 (1847); Albert's Ex'rs v. Ziegler's Ex'rs, 29 Pa. 50 (1857).

[4] Finney's Appeal, 59 Pa. 398 (1868); Commonwealth v. Crompton, 137 Pa. 138, 20 Atl. 417 (1890); for cases in other jurisdictions see Note (1925) 38 A. L. R. 1366.

[5] Shaffer v. Hoke, 80 Pa. Super. 434 (1923); for additional cases, see Note (1925) 40 A. L. R. 509.

[6] See Gourley v. Linsenbigler, 51 Pa. 345, 349 (1865); for cases in other jurisdictions see Note (1921) 25 A. L. R. 660.

[7] Huggin's Estate, 204 Pa. 167, 53 Atl. 746 (1902).

[8] Hani v. Germania Life Ins. Co., 197 Pa. 276, 47 Atl. 200 (1900); Scheid v. Storch, 271 Pa. 496, 115 Atl. 841 (1922); for cases in other jurisdictions see Note (1926) 47 A. L. R. 740.

[9] 122 Pa. 177, 15 Atl. 470 (1888).

[10] See cases cited Note (1926) 40 A. L. R. 1249.

[11] A rule of the banking institution provided, "The treasurer may, in proper cases, at his discretion, allow money to be paid on checks of the depositor, as in other banking institutions after notice as above provided." Walsh's Appeal, *supra* note 9, at 178. This savors more of an ordinary pass book than of a savings-deposit book, and has been cited for such a holding in 2 MORSE, BANKS AND BANKING (6th ed. 1928) § 612, n. 4; it would then be distinguished from the instant case. But Walsh's Appeal has more generally been cited as a case involving a savings-deposit pass book. 28 C. J. 702, n. 76; followed in Sisco's Estate, 63 Pa. Super. 147 (1916); and Grow's Estate, 17 Dist. 419 (Pa. 1908), in which it is severely criticized.

[12] Walsh's Appeal, *supra* note 9, at 189, 15 Atl. at 472.

It is submitted, however, that a savings deposit book embodies the contract between the bank and depositor, and is the evidence of the obligation of the bank, proof and production of which is requisite for recovery upon the contract;[13] hence it should fall within the class of instruments which are subjects of gifts *causa mortis*.[14] In a very recent Pennsylvania case, *In re Vance*,[15] the Superior Court, applying the rule of *Walsh's Appeal*, held that the delivery of a savings deposit book established a valid gift *causa mortis*, when accompanied by a written assignment thereof, the intent being clear. Since the assignment lacked consideration, however, and since, under the rule of *Walsh's Appeal*, the savings deposit book which accompanied it was not such an instrument as would make a gratuitous assignment irrevocable,[16] the assignment should have been held revoked by the death of the donor.[17] In drawing this distinction which does not rest on any substantial difference, the court, in *In re Vance*, evidently was seeking to avoid the harsh consequences[18] of *Walsh's Appeal*. A decision overruling the latter completely and bringing Pennsylvania into accord with the sound weight of authority is eminently desirable.

INCOME TAX—TAXABILITY OF AMOUNT RECEIVED FOR LIBEL TO BUSINESS REPUTATION—Petitioners received an amount in settlement of an action for an alleged libelous injury to their banking business. The Commissioner of Internal Revenue ruled that the compensation was taxable as income and his decision was sustained by the Board of Tax Appeals.[1] The petitioner appealed. *Held*, that the sum was not taxable. *Farmers' & Merchants' Bank v. Commissioner of Internal Revenue*, 59 F. (2d) 912 (C. C. A. 6th, 1932).

The definition of income has always been held to exclude the concept of return of capital,[2] but what return of capital involves has not always been clear.[3] Good will or business reputation is regarded as an asset,[4] and it follows

[13] Brown v. Toronto General Trusts Corp., 32 Ont. Rep. 319 (1901); Polley *et al.* v. Hicks, 58 Ohio St. 218, 50 N. E. 809 (1898). One of the savings deposit books, in the instant case, contained the following rules: ". . . 2. All savings deposits and all payments shall be entered in the depositor's book which shall be the evidence of the Bank's indebtedness to him. 3. Depositors cannot receive either principal or interest without producing their passbook . . ."

[14] Since it is not the mere evidence of a debt, but a "document contemporaneous with the creation of a debt", embodying the contract between the parties. Moore v. Darton, *supra* note 1, at 520; this test is applied to a postal savings book in *In re* Weston, *supra* note 1, at 685.

[15] 162 Atl. 346 (Pa. Super. 1932).

[16] As described in CONTRACTS RESTATEMENT, *supra* note 1.

[17] The bank had not satisfied its obligation until after the death of the donor. 1 WILLISTON, CONTRACTS (1924) § 440; Lonsdale's Estate, 29 Pa. 407 (1857); see Johnson v. Ogilbie, 2 Phila. 29 (Pa. 1856). The cases cited in *In re* Vance do not sustain its holding; Reap, Ex'r v. Wyoming Valley Trust Co., 300 Pa. 156, 150 Atl. 465 (1930), is based on a "joint tenancy with the right of survivorship" of a joint savings account; in Taylor's Estate, 154 Pa. 183, 25 Atl. 1061 (1893), which the court said closely resembled *In re* Vance, the donee gave consideration for the assignment of the savings account by giving a due bill in the same sum to the donor's mother. Yet, in Campbell's Estate, 274 Pa. 546, 118 Atl. 547 (1922), not cited in *In re* Vance, such an assignment was held to complete a gift *inter vivos* of a savings account, though the donor died before the donee presented the assigned deposit book to the bank for payment.

[18] A savings account will not be transferable as a gift *causa mortis* in any case where the gratuitous donee fails to demand payment of the obligation by the bank before the donor dies.

[1] 20 B. T. A. 622 (1930).

[2] See Eisner v. Macomber, 252 U. S. 189, 207, 40 Sup. Ct. 189, 193 (1919); United States v. Phellis, 257 U. S. 156, 169, 42 Sup. Ct. 63, 65 (1921); HOLMES, FEDERAL INCOME TAX (6th ed. 1925) 487 and 488.

[3] Compare Yates v. Whyel Coke Co., 221 Fed. 603 (C. C. A. 6th, 1915), with Kerbaugh-Empire Co. v. Bowers, 300 Fed. 938 (S. D. N. Y. 1924), and Burnet v. Campbell Co., 50 F. (2d) 487 (App. D. C. 1931).

[4] See Harris & Co. v. Lucas, 48 F. (2d) 187, 189 (C. C. A. 5th, 1931).

that should this be destroyed there would be a loss of capital. But as there would also be a loss of profits because of this loss of capital,[5] it becomes necessary in order to ascertain whether compensation for such loss is income or not, to determine what the compensation represents. Before the principal case was decided, it was the unadjudicated opinion that damages received for business libel were taxable.[6] Whether or not such a fund is taxable, however, should depend entirely on the particular facts at hand and the nature of the claim in the libel suit.[7] Any attempt to label libel as income would only lend further confusion to the concept of what income really is.[8] In the instant case the court concluded that what was being sought was damages to a capital asset, and what was recovered was a return of capital,[9] and hence properly ruled that on such findings of fact the sum was not taxable. In view of the fact, however, that the petitioner in his statement of claim sued for exemplary damages,[10] and that lost profits might well have been interpreted to be the controlling factor of the complaint [11] it is conceivable that, on deeper analysis of the facts, the court might have come to a different conclusion.[12]

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[5] As the Board pointed out in its opinion, *supra* note 1, at 626, the amount recovered will generally involve both a loss of profit and a loss of capital and it should be upon the petitioner to prove his loss. But the upper court ruled, at 913, that such profits were only evidentiary factors of what the business reputation was worth.

[6] S. 957, 1 Cum. Bull. 957; see Sol. Op. 132, I-1 Cum. Bull. 92; HOLMES, *op. cit. supra* note 2, at 855; see also FOULKE, THE FEDERAL INCOME TAX (1927) § 90 where the author infers that a sum recovered for business libel, being produced by business property, is taxable.

[7] In Hawkins v. Commissioner of Internal Revenue, 6 B. T. A. 1023 (1927), the Board ruled that recovery of an amount for a personal libel was not income as long as the damages represented compensation for injury. The Board also inferred that if the damages were punitive they were then taxable as income.

In Park v. Gillilan, 293 Fed. 129, 130 (S. D. Ohio 1921), the Court distinguished between a recovery of loss and a recovery of profit due to a tortious act. "The item represented, therefore, the distribution of the proceeds of a chose in action arising *ex delicto* long prior to March 1, 1913. It was compensation for an injury which John D. Park & Sons had suffered by reason of a violation of the Anti-Trust law. . . . It was not in itself a profit, but was indemnification for a wrong which had caused a loss of profits."

[8] See Note (1931) 45 HARV. L. REV. 1072.

[9] The court stated, at 914, that, "We think . . . that there is no logical basis upon which petitioner could be charged with gain. See Strother v. Commissioner, 55 F. (2d) 626, 633 (C. C. A. 4th, 1932)." The passage in this case to which the court referred reads: "A taxpayer is not allowed to deduct a loss from gross income until the amount is definitely fixed and ascertained; and, for the same reason, he should not be charged with gain on pure conjecture unsupported by any foundation of ascertainable fact." It would thus appear that the court in the principal case felt that there was no gain because the gain, if any, was unascertainable. It is submitted, however, that as the loss as well as the gain was of an uncertain nature, it should have been upon the taxpayer to prove his loss. Otherwise a condition would arise where no matter how large the sum is, any uncertainty of a part would make the fund untaxable.

That the loss of good will *is* regarded as uncertain is well shown in the fact that if it is destroyed it is held not to be deductible, because of its uncertainty, from the gross income: Red Wing Malting Co. v. Willcutts, 15 F. (2d) 626 (C. C. A. 8th, 1926). In the principal case, therefore, the court might well have decided the other way on the grounds that as the sum was received in a settlement based on a claim involving if not loss of profits at least exemplary damages, the taxpayer should prove his alleged loss by making what is uncertain certain.

[10] See the statement of claim *supra* note 1, at 624.

[11] *Id.*

[12] The Court, at 914, stated: "One may be recompensed for an injury but it is a rare case in which one should have a profit out of it." This phrase is undoubtedly erroneous for there are many suits in which punitive—Anchor Co. v. Adams, 139 Va. 388, 124 S. E. 438 (1924)—and triple—Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301 (1908)—damages are recovered. Courts might attempt to read into such a statement a general ruling that libelous damages are not taxable under any circumstances as income, and for that reason the phrase is unduly deceptive.

INSURANCE—JOINT LIFE POLICY—RIGHT OF ESTATE OF DECEASED WHERE THE SURVIVOR HAS MURDERED THE CO-INSURED—Husband and wife were jointly insured under policy which provided for payment of fund to survivor on the death of either. Husband murdered the wife, and her administratrix sued for the fund. *Held*, that she could not recover since, under the policy, insurer was obligated to pay the fund to the designated beneficiary only. *Merrity v. Prudential Ins. Co. of Am.*, 161 Atl. 681 (N. J. Sup. Ct. 1932).

A designated beneficiary who has murdered the insured is precluded by public policy from recovering the insurance.[1] But since public policy precludes only the wrongdoer and his successors,[2] the fund cannot be retained by the insurer but reverts to the insured's estate as though no beneficiary had been named.[3] The court, in the instant case, recognized this principle but held it inapplicable on the ground that the policy in question was a joint one and the fund could not be traced to the deceased alone inasmuch as the deceased and survivor both contributed to the payment of premiums, whereas in the adjudicated cases premiums were paid solely by the deceased. The court, guided by a single precedent,[4] thereupon looked to the contract and found that since only the survivor was named as a beneficiary, and he having forfeited his right to the fund, the policy lapsed of its own force. This conclusion can evoke but little sympathy. The intervention of public policy, while causing a forfeiture of the survivor's right, did not effect such an outright release to the insurer as would destroy alternative or independent rights.[5] Even under the strictest construction of the policy, therefore, the plaintiff estate should have been at least entitled to that portion of the fund which accrued from the premiums paid by the deceased herself.[6] Furthermore, the equities are such as would justify the awarding of

[1] Schmidt v. Northern Life Ass'n, 112 Iowa 41, 83 N. W. 800 (1900); Smith v. Todd, 155 S. C. 323, 152 S. E. 506 (1930); Swavely v. Prudential Ins. Co. of Am., 10 N. J. Misc. 1, 157 Atl. 394 (1931); VANCE, INSURANCE (2d ed. 1930) 598; see New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591, 600, 6 Sup. Ct. 877, 881 (1885).

[2] Sharpless v. Grand Lodge A. O. U. W., 135 Minn. 35, 159 N. W. 1086 (1916); Johnston v. Metropolitan Life Ins. Co., 85 W. Va. 70, 100 S. E. 865 (1919); 2 COUCH, CYCLOPEDIA OF INSURANCE LAW (1929) § 342; see Grossman, *Liability and Rights of the Insurer when the Death of the Insured is Caused by the Beneficiary or Assignee* (1930) 10 B. U. L. REV. 281, 303.

[3] Schmidt v. Northern Life Ass'n, *supra* note 1; Cleaver v. Mutual Res. Fund Life Ass'n, [1892] 1 Q. B. 147; Supreme Lodge v. Menkhausen, 209 Ill. 277, 70 N. E. 567 (1904); 1 PERRY, TRUSTS AND TRUSTEES (7th ed. 1929) § 183a; 2 COUCH, *loc. cit. supra* note 2.

[4] Spicer v. New York Life Ins. Co., 263 Fed. 764 (D. Ala. 1920), *aff'd* 268 Fed. 500 (C. C. A. 5th, 1920), *certiorari* denied 255 U. S. 572, 41 Sup. Ct. 376 (1921). This case involved a situation identical with the one in question. The court looked no further than the provisions of the policy and held that the representatives of the deceased could not recover. In concluding as it did, the Federal court justly criticised the specious reasoning of an earlier decision, Equitable Life Assur. Soc. v. Weightman, Adm'r, 61 Okla. 106, 160 Pac. 629 (1916), which held recovery for the deceased's estate in a like situation. As the New Jersey court points out, the Weightman case held the joint policy to be, in fact, two separate and distinct policies upon the life of each insured for the wholly separate benefit of each of the insured, and applied the rule applicable to policies where there is only one insured and one designated beneficiary. Following this decision the Oklahoma legislature enacted a statute providing for recovery of the fund by the representatives of the deceased even though the policy be a joint one. OKLA. COMP. STAT. ANN. (1931) § 1616. For a criticism of the Spicer case see (1921) 34 HARV. L. REV. 788.

[5] Cleaver v. Mutual Res. Fund Life Ass'n, *supra* note 3, at 151, 159, 160; Slocum v. Metropolitan Life Ins. Co., 245 Mass. 565, 139 N. E. 816 (1923); Sharpless v. Grand Lodge, *supra* note 2, at 36, 159 N. W. at 1087. See especially, Robinson v. Metropolitan Life Ins. Co., 69 Pa. Super. 274, 277 (1918).

[6] This is the logical conclusion from the cases which hold recovery for the insured's estate. While the court does not expressly admit such a portion should accrue to the estate, a logical inference to that effect might be drawn from its opinion. See p. 683, where the court says in part: "If public policy prohibits Mr. Swavely from taking any benefits from the policies, does it also cast upon the estate of Mrs. Swavely the right to the *whole* fund which it is not claimed was created by her payments alone?" (Italics the writer's.)

the whole fund to the plaintiffs as against the insurer.[7] The latter has received its premiums, and its obligation to pay has ripened on the death of the deceased.[8] On the other hand, the crime has deprived the plaintiffs of rights which would have ultimately accrued had the survivor, in the normal course of events, predeceased his victim.[9] In a situation such as this the equitable remedy of constructive trust might well be invoked to protect the equitable rights of the plaintiffs and prevent unjust enrichment of the insurer.[10] Since legal title to the fund still vests in the survivor, and since public policy has deprived him only of the right to benefit from his act, equity might award him the money as trustee to hold for the benefit of the deceased's estate.[11]

LIBEL AND SLANDER—LIABILITY OF BROADCASTING COMPANY FOR DEFAMATION—DEFAMATION BY RADIO AS CONSTITUTING LIBEL—Plaintiff, a political candidate, sued a speaker and a radio station jointly, for defamatory words read aloud from a written article and broadcast. *Held,* that the words constituted libel and not slander; and that the broadcasting company was absolutely liable for the defamation.[1] *Sorensen v. Wood et al.,* 243 N. W. 82 (Neb. 1932).[2]

The principal case marks the first attempt on the part of an appellate court to define the liability of broadcasting stations for the publication of defamatory material by radio. In refusing to base such liability on negligence the court applied the analogy of the newspaper publisher rather than that of the telegraph company. The latter, by the more recent decisions, is accorded a qualified privilege.[3] The public utility character of telegraph companies and the great social interest in the prompt transmission of communications justify this concession.[4]

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[7] It should be remembered that equity is administered by a separate tribunal in New Jersey so that the court here was unable to consider the case from an equitable standpoint. No attempt has been made to criticise the conclusion of the court on this ground. However, the court's opinion is strikingly wanting as regards "equitable" considerations of the case, and in no place is mention made that the court lacked Chancery powers.

[8] See the opinion of Lord Esher, M. R., in the Cleaver case, *supra* note 3, at 151.

[9] See VANCE, *op. cit. supra* note 1, at 602, 603.

[10] See Ames, *Can a Murderer Acquire Title by his Crime and Keep it?* (1897) 36 AM. L. REG. (N. S.) 225, reprinted in AMES, LECTURES ON LEGAL HISTORY (1910) 310. See also Pound, *The Progress of the Law—Equity* (1920) 33 HARV. L. REV. 420, 421; Note (1916) 64 U. OF PA. L. REV. 307.

[11] See Ames, *supra* note 10. See application of constructive trust doctrine in case involving estate by the entirety. Barnett v. Couey, 224 Mo. App. 913, 27 S. W. (2d) 757 (1930). See discussion of this case in (1930) 44 HARV. L. REV. 125; Note (1931) 11 B. U. L. REV. 129.

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[1] The broadcasting company also defended on the ground that a privilege was conferred by the RADIO ACT of 1927. "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, . . . *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. . . ." 44 STAT. 1170 (1927), 47 U. S. C. A. § 98 (1930 Supp.). The court ruled that this merely prevents the licensee from censoring words as to their political and partisan trend. To the same effect see ZOLLMAN, LAW OF THE AIR (1927) § 170; Vold, *Defamation by Radio* (1932) 2 RADIO L. J. 673, 692 ff.; Note (1931) 40 YALE L. J. 967.

[2] For an excellent discussion of the issues involved in the principal case see Vold, *supra* note 1.

[3] Nye v. Western Union Telegraph Co., 104 Fed. 628 (C. C. D. Minn. 1900); Flynn v. Western Union Telegraph Co., 199 Wis. 124, 225 N. W. 742 (1929); Note (1929) 78 U. OF PA. L. REV. 252; Note (1930) 29 MICH. L. REV. 339.

[4] For an exhaustive treatment of the subject see Smith, *Liability of a Telegraph Company for Transmitting a Defamatory Message* (1920) 20 COL. L. REV. 30.

A publisher, on the other hand, is liable at his peril for the defamatory statements he prints.[5] A broadcasting company, like a newspaper, is a commercial advertising agency.[6] If in one case public expediency operates to shift the burden upon the person who creates the risk of defamation in order to derive a profit therefrom, it should do so in the other.[7] It would seem that in a situation involving a chain broadcast the analogy of the instant case, if inflexibly applied, might impose absolute liability only on the initial station.[8] The conclusion that the liability of broadcasting companies is predicated on the law of defamation carries with it the additional problem of determining whether the utterances are to be treated as libel or slander.[9] Although the result of the principal case appears to do violence to precedent,[10] it is submitted that most of the reasons commonly advanced for imposing a broader liability for libel than slander are present in instances of radio defamation.[11] Moreover, novel forms of defamatory publication have, as they have arisen in the past, usually been classified as libel.[12] It is to be regretted that the court felt it necessary to fortify its opinion

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[5] Peck v. Tribune Co., 214 U. S. 185, 29 Sup. Ct. 554 (1909); Perret v. New Orleans Times, 25 La. 170 (1873). Mistakes, whether negligent or non-negligent, afford no excuse. Taylor v. Hearst, 107 Cal. 262, 40 Pac. 392 (1895); Jones v. Hulton & Co., [1910] A. C. 20.

[6] Moreover broadcasting companies can hardly be called public utilities. They deal with whomever they wish, control their programs, and fix their rates. In this connection see (1929) 54 A. B. A. REP. 490-491; (1931) 56 A. B. A. REP. 98-100.

[7] Vold, *supra* note 1, 679-688. But see DAVIS, THE LAW OF RADIO COMMUNICATION (1927) 164, 168-169, suggesting that the same liability should not obtain since a radio station frequently cannot prevent defamatory utterances even by the exercise of a high degree of care. To the same effect see Note (1931) 1 RADIO L. J. 362; and Guider, *Liability for Defamation in Political Broadcasts* (1932) 2 RADIO L. J. 708.

[8] A seller or distributor of libelous matter is not liable therefor if he had no knowledge of its defamatory character, and he was not negligent in being ignorant thereof. Vizetelly v. Mudie's Select Library, [1900] 2 Q. B. 170; see DAVIS, *op. cit. supra* note 7, at 170. But *cf.* Buck *et al.* v. Jewell-La Salle Realty Co., 283 U. S. 191, 51 Sup. Ct. 410 (1931) (holding that the acts of a hotel proprietor in making available to his guests through a radio receiving set the hearing of a copyrighted musical composition constitute a performance of such composition within the meaning of the COPYRIGHT ACT, 17 U. S. C. A. § 1 (e) (1927)).

[9] "Libel is in all cases actionable *per se;* but slander is not actionable without proof of special damage, save in certain exceptional cases." SALMOND, TORTS (7th ed. 1928) 561. "Thus it is not necessary to prove special damage in any action of libel." NEWELL, SLANDER AND LIBEL (4th ed. 1924) 834. Thorley v. Lord Kerry, 4 Taunt. 355 (Eng. 1812).

Sometimes courts use the misleading expressions "libelous *per se*" and "not libelous *per se*" to signify statements defamatory or not defamatory on their face. Principal case at 86. It is submitted that matter which is "not libelous *per se*" is simply not defamatory. The use of the phrase "not libelous *per se*" is apt to convey an impression that some libels are not actionable *per se*. See Smith, *supra* note 4, 42, n. 41. This phase of the instant case is also treated in (1932) 32 COL. L. REV. 1255.

[10] "Slander is oral defamation published without legal excuse, and libel is defamation published by means of writing, printing, pictures, images, or anything that is the object of the sense of sight." 1 COOLEY, TORTS (4th ed. 1932) § 136. To the same effect see BURDICK, TORTS (3d ed. 1913) § 353; POLLOCK, TORTS (13th ed. 1929) 242. But see Smith, *supra* note 4, at 43, for a careful development of the contention that the transmission of a written message by telegraph is the publication of a libel, although "made known by means of sounds like the human voice".

[11] Libel is more heavily punished than slander because of its greater possibility of harm and the greater deliberateness on the part of the perpetrator. 1 COOLEY, *op. cit. supra* note 10, § 144. "On the mischief side, radio defamation certainly would seem to be more like libel than slander." ZOLLMAN, *op. cit. supra* note 1, § 195. See Lord Mansfield's classic criticism of these reasons in Thorley v. Lord Kerry, *supra* note 9.

[12] De Libellis Famosis, 5 Co. 125a (K. B. 1606); Ellis v. Kimball, 16 Pick. 132 (Mass. 1834) (a picture); Johnson v. Commonwealth, 10 Sad. 514 (Pa. 1888) (an effigy); Schultz v. Frankfort Marine, *etc.*, Ins. Co., 151 Wis. 537, 139 N. W. 386 (1913) (open and notorious shadowing); Merle v. Sociological Research Film Corp., 166 App. Div. 376, 152 N. Y Supp. 829 (1915) (moving pictures); Varner v. Morton, 53 Nova Scotia Rep. 180 (1919) (shooting off guns and blowing horns); see POLLOCK, *op. cit. supra* note 10, 242, n. (a): "*Quære*, whether defamatory matter recorded on a phonograph would be a libel or only a potential slander."

by alluding to the fact that the speech was read from a written copy.[13] The inference follows that the same matter, if broadcast as a purely oral address, might have been termed slander. For this reason the decision cannot be regarded as a forceful departure from the arbitrary anomalies that have abounded in the law of defamation for three centuries and a step in the direction of the goal advocated by Veeder: the assimilation of the law of slander into that of libel.[14]

TAXATION—STATE LEVY ON NATIONAL BANK SHARES—COMPETITION BETWEEN NATIONAL BANKS AND BUILDING AND LOAN ASSOCIATIONS—A national bank sought to enjoin the State of Ohio from collecting a tax levied on bank stock at a rate higher [1] than that imposed upon building and loan associations and mortgage companies whose loans on realty [2] were alleged to bring their funds, as competing "moneyed capital", within the terms of Revised Statute § 5219.[3] *Held,* that the injunction will be denied since no discrimination in favor of mortgage companies was proved,[4] and since the fundamental purpose of building and loan associations as organizations for the mutual benefit of home building shareholders is protected by a sound public policy that justifies lighter taxation.[5] *Hoenig v. Huntington National Bank of Columbus,* 59 F. (2d) 479 (C. C. A. 6th, 1932).

Whether or not specific capital is competing with that of national banks depends upon a factual test, applicable by appellate courts,[6] which declares that there is competition, and hence there must be approximate equality of taxation,

[13] Principal case at 85. Any distinction between cases where written and non-written matter is broadcast is artificial. DAVIS, *op. cit. supra* note 7, at 150. The manuscript is for the guidance of the speaker and the real purpose is the transmission of sound. Vold, *supra* note 1, at 690.

[14] Veeder, *History and Theory of the Law of Defamation* (1904) 4 COL. L. REV. 33, at 54.

[1] That the tax in the instant case [OHIO GEN. CODE (2155, 1926) § 5408] materially favored building and loan associations was practically admitted (pp. 490, 491).

[2] The evidence of the building and loan officials (principal case, pp. 488-490) shows that a borrower was required to make only a payment of one dollar on a share whose par value was anywhere from $100 to $1000. Although, as in one case, the interest on the loan was 7 per cent. and the dividend on the share 5 per cent., the borrower's fractional interest in the share and dividend was so slight as to reduce the transaction to practically a direct loan. The evidence also included "straight" loans for three years.

[3] "In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks: *Provided,* That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section." 13 STAT. 99, 111-112 (1864), amended, 15 STAT. 34 (1868), 42 STAT. 1499 (1923); 12 U. S. C. A. § 548, 1 (b) (1927). For a discussion of the amendments and their effect see Note (1926) 10 MINN. L. REV. 241, 243-248.

[4] The discussion here will not include what constitutes discrimination under a state law.

[5] In Mercantile National Bank of Cleveland v. Hubbard, 98 Fed. 465 (C. C. A. 6th, 1899), relied upon by the majority in the instant case, Taft, J., declared (at page 471) that even though a building and loan association loaned directly to non-shareholders, it would not change the *purpose* of the association which was encouraged by the public policy. The modern attitude seems to deny the existence of a policy that excuses admittedly competitive practices merely because of an originally beneficial purpose. *Infra* notes 16, 18, 19.

[6] First National Bank of Hartford v. Hartford, 273 U. S. 548, 552, 47 Sup. Ct. 462, 463 (1927), 59 A. L. R. 1 (1929), a leading modern case which points out the repudiation of Jenkins v. Neff, 186 U. S. 230, 235, 22 Sup. Ct. 905, 907 (1902) and its principle that the appellate court will consider as conclusive the lower court's finding that a trust company did not compete.

"wherever capital, substantial in amount when compared with the capitalization of national banks, is employed either in a business or by private investors in the same sort of transactions as those in which national banks engage in the same locality." [7] The alleged competitive activities should be specifically pointed out,[8] although they need not include all phases of banking.[9] For example, the power of national banks to invest in mortgages [10] brings them into competition with other corporations similarly investing.[11] Therefore, although public policy has protected the basic, non-commercial purpose of insurance companies,[12] trust companies,[13] savings banks,[14] and building and loan associations [15] by declaring them not in competition with and so not taxable as national banks, the courts have not hesitated to go behind these labels in determining whether the modern financial practices of such institutions warrant the continuation of this protection.[16] In more than one instance, by violating the traditional "mutuality" [17] of its activity, a building and loan association has been denied the privileges usually extended to its class,[18] and where one was shown to have non-borrowing shareholders, who thus became investors for profit, it was held to compete with national banks.[19] From the evidence in the instant case as quoted by dissenting Judge Tuttle, it would seem that a similar rule should have been applied here.[20]

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[7] *Id.* at 558. *Cf.* Note (1927) 4 WIS. L. REV. 102, 105-106.

[8] Georgetown National Bank v. McFarland, 273 U. S. 568, 47 Sup. Ct. 467 (1927); *cf.* Public National Bank of New York v. Keating, 38 F. (2d) 279, 282 (S. D. N. Y. 1930).

[9] Minnesota v. First National Bank, 273 U. S. 561, 567, 47 Sup. Ct. 468, 470 (1927); People *ex rel.* Morris Plan Co. v. Burke, 253 N. Y. 85, 170 N. E. 502 (1930) (loans to be repaid in weekly instalments held to compete with national bank straight loans).

[10] 38 STAT. 251, 273 (1913); 39 STAT. 752, 754 (1916); 12 U. S. C. A. § 371 (1927); 44 STAT. 1224, 1232-1233 (1927); 12 U. S. C. A. SUPP. § 371 (1932); First National Bank v. Anderson, 269 U. S. 341, 353-354, 46 Sup. Ct. 135, 140 (1926).

[11] People *ex rel.* Title and Mortgage Guaranty Co. v. Burke, 253 N. Y. 93, 170 N. E. 505 (1930) (buying and selling mortgages).

[12] People v. Commissioners, 4 Wall. 244, 256-257 (U. S. 1866).

[13] Mercantile National Bank v. New York, 121 U. S. 138, 159, 7 Sup. Ct. 826, 837 (1887).

[14] Bank of Redemption v. Boston, 125 U. S. 60, 66, 8 Sup. Ct. 772, 775 (1888).

[15] Mercantile National Bank v. Hubbard, *supra* note 5.

[16] Trust Companies: See Traynor, *Taxation of National Banks in California* (1927) 17 CALIF. L. REV. 83, 99, n. 32; *cf.* Bolles, *Some Aspects of National Bank Taxation* (1909) 57 U. OF PA. L. REV. 505, 514-515. Savings Banks: National Bank v. King County, 153 Wash. 351, 355, 280 Pac. 16, 18 (1929) (part of evidence of competition was investments by a "mutual savings bank").

[17] The mutuality referred to is the essential characteristic of a building and loan company where the borrower is alloted dividend-paying shares which he pays for by instalments. The dividends he receives have the practical effect of reducing the interest he must pay on his loan; low cost of capital to home builders results. But, if shareholders do not borrow, or if borrowers do not pay on their shares, the former become investors for profit, and the latter may as well borrow from a bank where they do not share in the profits.

[18] A helpful analogy may be found in the case where building and loan associations are exempt from paying income tax to the federal government [43 STAT. 282 (4) (1924), 26 U. S. C. A. § 982 (1928)] providing shareholders are borrowers. Appeal of Oul Building and Loan Ass'n, 6 B. T. A. 1196 (1927). Thus, where a large proportion of substantial loans went to fractional shareholders, and most of the deposits came from non-shareholders, the association was held to have forfeited its tax-free status. Guaranty State Savings and Loan Co. v. Commissioner of Internal Revenue, 14 B. T. A. 72 (1928).

[19] Commercial National Bank v. Custer County, 275 U. S. 502, 48 Sup. Ct. 155 (1927), a memorandum opinion, applies the strict factual test of competition as stated in the Hartford case, *supra* note 6, at 559, 560, and the Minnesota case, *supra* note 9, at 567, 568, to a building and loan company, reversing the Supreme Court of Montana which had relied on the public policy, 76 Mont. 45, 62, 245 Pac. 259, 264 (1926). Of course, if the company loans only to bona fide shareholders, it does not compete because of substantially different operations.

[20] *Supra* note 2.

TORTS—LIABILITY OF EMPLOYER FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR—INHERENTLY DANGEROUS SITUATIONS—The defendant was ordered by borough authorities to take down walls which were left in a ruinous condition after fire had destroyed his property. The defendant hired *T*, an independent contractor, to perform the work of demolition. Because of *T's* negligence, a wall collapsed, and fell upon the adjoining premises of the plaintiff, causing considerable damage. *Held,* that defendant is not liable for injuries resulting from the negligence of an independent contractor. The fact that the work contracted for was "inherently dangerous" in character is immaterial. *Silveus v. Grossman,* 161 Atl. 362 (Pa. 1932).

American courts generally have qualified the doctrine of nonliability of an employer for the torts of an independent contractor [1] by declaring, upon factual situations similar to that in the principal case, that the duty of the employer to see that due care is used in performing work of an inherently dangerous character is non-delegable.[2] The principal case represents the viewpoint of a small minority.[3] Since the decision is not a departure from the precedents of the jurisdiction,[4] it is interesting chiefly because of the opinion of Judge Maxey, which rationalizes the attitude of the court in not allowing recovery. His attack [5] upon

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[1] Bush v. Steinman, 1 Bos. & P. 404 (Eng. 1799), holding liability, was eventually repudiated in Reedie v. London N. W. R. Co., 4 Exch. 244 (Eng. 1849). American courts follow the Reedie case. TORTS RESTATEMENT § 279. The *rationale* of the nonimputation of negligence is generally said to be the undesirability of imposing liability for tortious acts which are beyond the defendant's control. Scammon *et al.* v. Chicago, 25 Ill. 424, 437 (1861); 2 MECHEM, AGENCY (2d ed. 1914) § 1917. But the real reason is the court's conception of what is expedient. See Note (1903) 65 L. R. A. 620, 634. The doctrine has been generally qualified by several important exceptions, besides the situation of the instant case. Where the inevitable result of the work is the injury produced, Southern Railroad Co. v. Lewis, 165 Ala. 555, 51 So. 746 (1910); TORTS RESTATEMENT § 280; see Note (1922) 21 A. L. R. 1229. Where the employer negligently selects the contractor, Beninghoff v. Futterer, 176 Ill. App. 579 (1913); Roice v. Steinmetz, 61 Cal. App. 102, 214 Pac. 257 (1923); TORTS RESTATEMENT § 281. Where the law imposes a positive duty, The Omsk, 266 Fed. 200, 202 (E. D. Va. 1920); Hudgins v. How, 240 Fed. 387 (N. D. Ala. 1917); Dalton v. Angus, 6 App. Cas. 740 (Eng. 1881); see TORTS RESTATEMENT §§ 287, 289. Where the defendant is the owner of real estate, TORTS RESTATEMENT § 292.

[2] Besner v. Central Trust Co., 230 N. Y. 357, 130 N. E. 577 (1921); Donovan v. Oakland Rapid Transit Co., 102 Cal. 245, 36 Pac. 516 (1894); Alabama Great Southern R. Co. v. Killian, 17 Ala. App. 124, 82 So. 572 (1919); TORTS RESTATEMENT § 297. The rule must be distinguished from that of Bower v. Peate. "A man who orders work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent mischief and cannot relieve himself of his responsibility by employing someone else." Bower v. Peate, 1 Q. B. D. 321, 326 (Eng. 1876). See also Hardaker v. Idle Dist. Council, [1896] 1 Q. B. 335. TORTS RESTATEMENT § 286. The rules, however, often apply to the same factual situations. "The English cases have extended the liability of the employer of an independent contractor far beyond the point to which American cases have carried it." TORTS RESTATEMENT § 279, Appendix. The American doctrine is, in some jurisdictions, coextensive with the English rule; in others, more limited in the possibilities of its application. Compare Covington & Cincinnati Bridge Co. v. Steinbrock, 61 Ohio 215, 55 N. E. 618 (1899), with Engel v. Eureka Club, 137 N. Y. 100, 32 N. E. 1052 (1893).

[3] Simmons v. Allegany County, 105 Md. 254, 65 Atl. 167 (1907); Stephensville, *etc.,* Ry. v. Couch, 86 Tex. Civ. App. 336 (1906).

[4] Although until the principal case, the Pennsylvania decisions had not expressly rejected the doctrine, their spirit and result were antipathetic. See Allen v. Willard, 57 Pa. 374 (1868); Wray v. Evans, 80 Pa. 102 (1875); Chartiers Valley Gas Co. v. Lynch, 118 Pa. 362, 12 Atl. 435 (1888).

[5] The court might have avoided such discussion by declaring, reasonably enough in view of decisions upon the same facts in other jurisdictions, that the work was not sufficiently dangerous as to warrant the application of the doctrine. *Accord:* Engle v. Eureka Club, *supra* note 2. *Contra:* Covington & Cincinnati Bridge Co. v. Steinbrock, *supra* note 2; Dillon v. Hunt, 105 Mo. 154, 16 S. W. 516 (1891).

the "inherently dangerous situations" rule as applied in other jurisdictions centers upon its alleged unfairness and indefiniteness.[6] Forceful as his arguments may be, it is clear that the convictions of the majority of modern authorities on tort law are to the contrary.[7] It is true that the definitions of courts as to what an inherently dangerous situation is are at present various and confusing.[8] But it is believed that a fair and workable rule may be arrived at, by holding the employer liable on such grounds only where the work contracted for is such as to require a high degree of care in performance in order to avoid probability [9] of injury to third persons or their property.[10] If, however, in the opinion of the court, a rule based on the distinction between a high and a usual degree of care, as is the above, is illusory, it seems fairer to hold the employer liable in all cases for torts of an independent contractor within the scope of his employment [11] than to hold him liable in none. The fact that he gets the benefit of the work,[12] and also that he may with ease select a contractor who carries liability insurance,[13] are persuasive.

Another point of possible distinction, not, however, widely insisted upon, may be that since the work was made necessary by an "act of God", the employer in ordering the tearing down of the walls did not *create* a dangerous situation, but merely took reasonable means to remedy an already existent danger, *i. e.*, the unsafe condition of the ruins. In this connection, see West. Canada Power Co. v. Velasky Co., 20 Dom. L. R. 92 (1914). Of course, where the demolition of the property is occasioned by the desire of the owner to improve his premises, no such mitigating circumstances should be held to exist, and he for whose *benefit* the work is being done should pay, if in fact the walls because of age, *etc.*, are in a dangerous state. Hughes v. Percival, 8 App. Cas. 443 (Eng. 1883).

[6] Judge Maxey's argument is briefly the unfairness and impracticability of allowing recovery under a doctrine which imposes a non-delegable duty upon an employer for any work which if carelessly done is dangerous, as he interprets the doctrine of inherently dangerous situations.

[7] See TORTS RESTATEMENT § 297; Note (1923) 23 A. L. R. 1084.

[8] See Note, 23 A. L. R., *supra* note 7, at 1086, 1088. If "inherently dangerous" is defined, as some courts do, as anything that will probably cause injury *if due care is not taken*, the doctrine amounts to a virtual abrogation of the general rule of the employer's non-liability.

[9] A mere possibility of injury is, of course, not sufficient. Bibb's Adm'r v. Norfolk & W. R. R., 87 V. 711, 14 S. E. 163 (1891).

[10] This appears the reasonable interpretation of the phrase "inherently dangerous." See Note, 23 A. L. R., *supra* note 7, at 1089. The employer should take reasonable precautions to prevent injurious consequences of dangerous work. Cameron Mill & Elevator Co. v. Anderson, 34 Tex. App. 103, 78 S. W. 8 (1903). Although the standard of care required may call for the employment of another to do technical work, Burke v. Ireland, 166 N. Y. 305, 59 N. E. 914 (1901), this obligation "is by no means incompatible with the existence of an obligation to answer for the acts and omissions of that substitute." 23 A. L. R., *supra* note 7, at 1084.

[11] See TORTS RESTATEMENT § 279, Appendix; Note (1927) 39 YALE L. J. 861; (1927) 37 YALE L. J. 113. The tendency of modern decisions is in accord. See *supra* note 1.

[12] "It is equally a hardship that one should suffer loss by the negligent performance of work which he in no way promoted and over which he had no control." Covington & Cincinnati Bridge Co. v. Steinbrock, *supra* note 5, at 229, 55 N. E. at 621.

[13] See TORTS RESTATEMENT § 279, Appendix. It must be borne in mind that the employer has the right of set-off against the contractor for damages collected from him because of the contractor's negligence. Walton v. Cherokee Colliery Co., 70 W. Va. 48, 73 S. E. 63 (1911).